Calendar No. 979

98TH CONGRESS *2d Session*	SENATE	REPORT 98-512

AMENDMENT TO THE COASTAL ZONE MANAGEMENT ACT OF 1972

REPORT

together with

MINORITY VIEWS

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 2324

TO AMEND THE COASTAL ZONE MANAGEMENT ACT OF 1972 REGARDING ACTIVITIES DIRECTLY AFFECTING THE COASTAL ZONE

JUNE 13 (legislative day, JUNE 11), 1984.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

31-010 O WASHINGTON : 1984

S263-27

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CONTENTS

	Page
Purpose of the bill	1
Background and needs	1
Legislative history	3
Summary of major provisions	4
Estimated cost	4
Regulatory impact statement	5
Section-by-section analysis	6
Natural resources or land or water uses	9
Fully consistent	9
Enforceable, mandatory policies	10
Exceptions	11
Magnuson Fishery Conservation and Management Act	13
Votes in committee	14
Changes in existing law	15
Minority views of Mr. Stevens	16
Minority views of Messrs. Stevens, Long, and Goldwater	19

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REPORT
98-512

AMENDING THE COASTAL ZONE MANAGEMENT ACT OF 1972

JUNE 13 (legislative day, JUNE 11), 1984.—Ordered to be printed

Mr. PACKWOOD, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 2324]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2324), to amend the Coastal Zone Management Act of 1972 regarding activities directly affecting the coastal zone, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and an amendment to the title and recommends that the bill do pass.

PURPOSE OF THE BILL

The bill, as reported, amends the Coastal Zone Management Act of 1972 (CZMA) regarding activities significantly affecting the coastal zone.

BACKGROUND AND NEEDS

The CZMA was created to address the national need "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone." The coastal zone is rich in a variety of natural, commercial, industrial, and recreational resources of immediate and future value to the Nation.

By the end of this decade, 75 percent of the American people will live within 50 miles of the oceans or Great Lakes. Conflicts over use of the coastal zone are inevitable given the demands placed on

limited coastal resources. These pressures were emerging when Congress passed the CZMA. The focus of the act was to encourage States to develop comprehensive coastal zone management (CZMA) programs in response to the need for coastal resource planning.

Although developed by the States, coastal management plans are federally approved to ensure that they meet national needs and standards. Since 1972, 28 States and territories have implemented federally-approved coastal management plans.

Through the CZMA, Congress offered coastal States two incentives for developing management plans. First, Federal grants were available to assist States in developing and maintaining CZMA programs. Also, the Federal Government made the commitment that Federal activities or private activities carried out under Federal license or permit affecting the coastal zone would be carried out in a manner consistent with provisions of State coastal management plans. Section 307 of the CZMA, the consistency provisions, mandates this Federal commitment.

Section 307(c)(1) states that Federal activities that directly affect the coastal zone must be conducted in a manner which is, to the maximum extent practicable, consistent with approved state management programs. The most contentious issues concerning section 307(c)(1), the Federal consistency provision, pertains to Outer Continental Shelf (OCS) oil and gas lease sales.

The Department of the Interior has maintained that the sale of OCS oil and gas leases does not "directly affect" the coastal zone and, therefore, should not be subject to CZMA's consistency provisions.

The existing Department of Commerce regulations explicitly indicate that Interior's OCS pre-lease activities are subject to CZMA's Federal consistency provisions. In 1981, Commerce sought to change the regulations to omit pre-lease activities from coverage; however, congressional expressions of disapproval led Commerce to withdraw its proposed change.

Nonetheless, Interior refused to review OCS lease sales for consistency and refused to enter into consultation with the States to resolve conflicts with State coastal programs. Interior's refusal to review Lease Sale 53 (off the coast of central California) for consistency with the California Coastal Management Program led California to file suit to force Interior to comply with its consistency obligations. Both the Federal district court and the Ninth Circuit Court of Appeals ruled that Lease Sale 53 did directly affect the California coastal zone, thus obligating Interior to act in accordance with the Federal consistency provisions of section 307(c)(1).

However, on January 11, 1984, the Supreme Court, in a 5–4 decision, reversed the Ninth Circuit Court's ruling. The Court held that Interior's sale of OCS oil and gas leases is not an activity "directly affecting" the coastal zone. Furthermore, the Court interpreted the legislative history of the CZMA to mean only those Federal activities conducted within the coastal zone are subject to Federal consistency provisions of the CZMA. Therefore, according to the Supreme Court decision, OCS lease sales are beyond the scope of the act.

The Supreme Court's decision opens the way for any Federal activities occurring beyond a State's coastal zone, regardless of the

impact of such activities on the coastal zone, to be exempt from CZMA consistency.

S. 2324 was introduced to rectify the Supreme Court's ruling. First, the bill addresses the Court's contention that Interior's oil and gas leasing program does not "directly affect" the coastal zone. The bill establishes Congress' intent that Interior's leasing program is subject to the Federal consistency provisions of section 307(c)(1).

Also, S. 2324 reverses the Court's finding regarding the geographical scope of the CZMA. The bill establishes that Congress' intent in passing the CZMA was to require consistency for any Federal activity affecting the coastal zone, without regard to the location of the activity.

Proponents of the bill believe that having consistency review apply at the lease sale stage best serves the interests of the Nation, coastal States and industry. The lease sale is an extremely important step in the leasing process. Key decisions are made by Interior at this time regarding the location of tracts to be leased, the timing of leasing and the conditions under which subsequent activities will occur. Moreover, millions of dollars exchange hands at this point where the leases are sold, making subsequent decisions to undo the leases or significantly alter the course of exploration and development extremely costly, disruptive and practically difficult. It is sensible that the Secretary of Interior's decisions at the lease sale stage must be subject to the consistency requirement, rather than waiting until the subsequent exploration or development/production stages.

The fear has been voiced that this amendment subjecting OCS oil and gas lease sales to consistency review would mean that certain States may use such authority to totally block OCS development. However, the CZMA has never been used, and, in fact, cannot be used in this fashion. This Committee notes that OCS energy development is defined as a national objective of the CZMA (section 302(j)), and that coastal States, in order to establish amd maintain a federally-approved coastal management program, must "provide for adequate consideration of the national interest involved in planning for, and in the siting of facilities (including energy facilities in, or which significantly affect most (States) coastal zone) which are necessary to meet requirements which are other than local in nature" (section 306(c)(8) of the CZMA). A State's refusal to consider adequately this national interest would constitute grounds for disapproval of the program by the Secretary of Commerce. Disapproval would, of course, mean that the coastal State would lose its authority under the CZMA to review Federal activities for consistency. The Committee believes this statutory check on the abuse of a coastal State's consistency authority is sufficient to ensure that coastal States act responsibly.

Legislative History

On February 22, 1984, Senators Packwood and Hollings introduced S. 2324 amending the Coastal Zone Management Act to reverse the decision of the Supreme Court of January 11, 1984, in *Secretary of the Interior* v. *California.* S. 2324 was referred to the

Committee on Commerce, Science, and Transportation, which held a hearing on March 28, 1984. The Committee heard testimony from the Department of the Interior and Commerce, the oil industry, coastal States, environmental interest groups, and fishing interests. On May 8, 1984, the Committee met in executive session and favorably reported S. 2324 to the Senate with an amendment in the nature of a substitute and an amendment to the title.

The Committee vote was 9 to 7.

Summary of Major Provisions

As reported, S. 2324, which amends the Coastal Zone Management Act of 1972, would:

(1) Substitute the phrase "significantly affecting" in place of the term "directly affecting." "Directly affecting" has never been defined in either the CZMA statute or the Department of Commerce regulations. The phrase "significantly affecting" is currently used in the National Environmental Policy Act (NEPA) and is extensively defined in case law and the Council of Environmental Quality (CEQ) regulations that implement NEPA.

(2) Include the phrase "natural resources or land or water uses in the coastal zone" to clarify in the statute that Congress is focusing on impacts that affect only certain elements of the coastal zone.

(3) Substitute the phrase "fully consistent" for the existing statutory requirement of consistent "to the maximum extent practicable" to clarify what has been considered by the courts to be an ambiguous term.

(4) Codify a term currently used in the Commerce regulations—"enforceable, mandatory policies"—to clarify that Federal activities are only required to be consistent with certain provisions of approved State management programs.

(5)(a) Exempt from full consistency those Federal activities undertaken to counter the immediate effects of a Presidentially declared national emergency.

(b) Exempt from full consistency those activities of the Department of Defense (DOD) that are necessary for reasons of national security.

(c) Exempt from full consistency those Federal activities required by another Federal law which prevents full consistency with approved State management programs.

Federal activities that are prevented from achieving full consistency by the circumstances described above may deviate from full consistency only to the extent justified by the presence of such circumstance.

(6) Exempt Federal activities undertaken pursuant to the Magnuson Fishery Conservation and Management Act, (16 U.S.C. 1801 et seq.) from the consistency provisions of the CZMA.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget

Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 30, 1984.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2324, a bill to amend the Coastal Zone Management Act of 1972 regarding activities directly affecting the coastal zone, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, May 8, 1984. Enactment of this bill may reduce receipts received by the federal government from the Outer Continental Shelf (OCS) leasing program, but the amount of such losses cannot be estimated.

The bill requires that any federal agency conducting activity "significantly" affecting the natural resources in the coastal zone shall conduct that activity in a manner fully consistent with the enforceable mandatory policies of approved state management programs. This would apply a different standard than the current statute, which requires activities "directly" affecting the coastal zone to be consistent with state management programs.

OCS leasing procedures would become subject to a more stringent test than under current law, as interpreted by the Supreme Court. As a result, certain tracts may not be leased, bonuses may be reduced, and future royalties may be forgone. However, the magnitude of these effects cannot be determined, because there is no clear basis for determining what delays or cancellations would occur under this new standard that would not occur under current law.

Enactment of this bill would not result in significant costs to state or local governments.

This letter supersedes our previous letter on S. 2324, dated May 25, 1984. If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

RUDOLPH G. PENNER, *Director.*

REGULATORY IMPACT STATEMENTS

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

Enactment of S. 2324 would only impose additional responsibility on the Federal government. It involves no additional regulation of the private sector. The bill, as reported, will have no effect on number or types of individuals regulated, and will not affect the economic state or personal privacy of such persons.

Federal agencies conducting or supporting activities, regardless of geographical location, that significantly impact the coastal zone will be required to prepare a consistency review. Such review was required of Federal agencies before the Supreme Court decision of

January 11, 1984. S. 2324 does not change the content or format of a Federal consistency review, but clarifies the conditions for determining when a review is required.

Current National Oceanic and Atmospheric Administration (NOAA) regulations regarding the application of Federal consistency will need to be revised only to the extent necessary to conform to the language changes in the bill. The bill will not impose any additional regulations beyond those in existence at the time of the Supreme Court decision. Federal regulation is decreased with respect to activities undertaken pursuant to the Magnuson Fishery Conservation and Management Act which previously had been subject to Federal consistency review.

Section-by-Section Analysis

The bill contains one section amending section 307(c)(1) of the Coastal Zone Management Act of 1972. The changes in the statute proposed in S. 2324 are intended to clarify and define the original intent of the CZMA.

SIGNIFICANTLY AFFECTING

As reported, S. 2324 substitutes the phrase "significantly affecting" for the term "directly affecting" that was originally used in the CZMA. There is currently no definition of "directly affecting" either in th act or in Department of Commerce regulations. This lack of a definition led to litigation between coastal States and the Department of the Interior over the applicability of consistency under the CZMA to OCS oil and gas lease sales resulting in a decision by the Supreme Court in *Secretary of Interior* v. *California* interpreting "directly affecting" in a manner that severely limited tha scope of the CZMA. If the Court's ruling is allowed to stand, no Federal activities outside the coastal zone, regardless of effects on State waters and shoreline, will be required to be consistent with federally-approved coastal management programs. The Committee rejects the interpretation of the Court.

Substituting "significantly affecting" addresses the need to define Congress' intent with regard to the Federal consistency provision (section 307(c)(1) of the CZMA. "Significantly affecting" is used in NEPA and an adequate definition of that phrase is provided in CEQ regulations. Substantial case law decided over the past 15 years since enactment of NEPA also serves to clarify application of that term.

In defining "significantly affecting," the Committee intends to reject two principal interpretations of "directly affecting" found in the Supreme Court decision. First, the Committee intends that the term "significantly affecting" not be given a narrow definition based on the location of the federally-conducted activity. The Committee finds that an activity can significantly affect the resources or land or water uses of the coastal zone regardless of whether it occurs within or outside the coastal zone. The intended test is one of significant effects, not of location of the activity.

The Committee maintains that Congress' intent in 1972 when the CZMA was enacted is indicated by a plain reading of the statutory language of section 307(c)(1). The Committee rejects the majority

opinion of the Supreme Court that the CZMA's purposes can be adequately effectuated without applying to Federal activities conducted outside the coastal zone.

The Committee's rejection of the Court's view ensures that Federal activities such as OCS oil and gas or mineral leasing, ocean disposal of nuclear submarines or other ocean dumping, as well as activities landward of the coastal zone, fall within the scope of section 307(c)(1). The Committee notes that the substitution of "significantly" for "directly" obviates the need for the parenthetical phrase indicating the geographical scope of section 307(c)(1) that was contained in S. 2324, as introduced.

Some concerns have been raised about the "landward" scope of the CZMA Federal consistency provision. The existing Department regulations (15 CFR 930.33) use the term "landward." It is the Committee's intent that activities of Federal land management agencies, such as those undertaken by the Forest Service in the management of National Forest System lands, will not be subject to any new expanded consistency requirements other than those existing prior to the Supreme Court's decision of January 11, 1984.

Second, the Committee intends that the definition of "significantly affecting" include the consequences flowing from the Federally-conducted or supported activity that are reasonably foreseeable and the Committee notes that such consequences are included within the range of the term "significantly affecting" under NEPA. In replacing the term "directly" with "significantly", the Committee rejects the Court's determination that OCS oil and gas lease sales do not "directly affect" the coastal zone, and, therefore, are not covered by the existing section 307(c)(1). The fact that lease sale effects are not immediate shall not preclude Federal consistency review by affected coastal States at the time that such significant Federal decisions are made. With this approach, the Committee intends that Federal OCS lease sale decisions be subject to the section 307(c) (1) Federal consistency review process. The fact that subsequent stages may require additional Government approvals should not excuse the lack of consideration of these impacts. The Committee believes that the CZMA's goals of Federal/State coordination, planning and management of the resources and uses of the coastal zone are best served by ensuring that Federally-conducted or supported activities are set on a course which will ensure consistency throughout subsequent stages and that the effects of the various stages are taken into account before the activity commences.

This Committee rejects the Supreme Court's opinion that lease sales belong under section 307(c)(3), not 307(c)(1), of the CZMA. Section 307(c)(1) applies to Interior's OCS lease sales. However, it is not the Committee's view—nor has it been Congress' intent—that activities in developing 5-year lease plans be subject to consistency review. As explained by the conferees in their report on secton 18(f)(5) of the Outer Continental Shelf Lands Act Amendments of 1978, the Secretary of the Interior must give consideration to coastal zone management programs, and establish procedures for doing so, but the Secretary need not be consistent with such programs to the maximum extent practicable in developing a 5-year lease plan. The U.S. Court of Appeals for the District of Columbia Circuit has

confirmed our reading of the law in *California* v. *Watt,* 712 F.2d 584. This Committee believes that consistency review at the lease sale stage, when coastal States may consider the effects of leasing specific OCS tracts, is sufficient to enable the States to commence their coastal management role conferred upon them by the CZMA.

The Committee borrows only that language from the CEQ regulations which is appropriate for application to the defined scope of the CZMA (activities which affect "the natural resources or land or water uses in the coastal zone") versus the broader NEPA context ("the human environment"). The CEQ regulations (40 CFR 1508.3) define "affecting" to mean "will or may have an effect". The use of that definition is relevant to the purposes of determining prospective effects on the coastal zone under the consistency provisions of the CZMA.

To expand on the issue of prospective effects, it is useful to employ a part of the "effects" definition in the CEQ regulations (40 CFR 1508.8). Effects can be direct or indirect. Indirect effects as explained in the CEQ regulations are effects caused by an action "and are later in time or farther removed in distance, but are still reasonably foreseeable".

To determine if an effect is significant the CEQ regulations (40 CFR 1508.27) require consideration of both the context and intensity of an activity. The context, as adapted for purposes of the CZMA, is clear. The bill, S. 2324, as reported, focuses strictly on activities significantly affecting the natural resources or land or water uses in the coastal zone. The Committee intends only that short- and long-term effects on the natural resources and land or water uses of the coastal zone, as opposed to the broader human environmental context of NEPA, should be considered in section 307(c)(1).

The CEQ regulations also offer sufficient guidelines for determining the intensity of an activity. For example, in determining the severity of impact of activities that may significantly affect the coastal zone, an agency should be cognizant of the unique characteristics of the geographic area, the degree to which the effects on the environment involve unique or unknown risks, or whether the action is related to other actions with individually insignificant but cumulatively significant impacts.

Concerns have been expressed that elements of the "effects" definition in the CEQ regulations, when applied to a significant effects test for requiring consistency, expand the scope of section 307(c)(1) beyond what Congress originally intended. The Committee agrees that aesthetic, cultural, historic, and social matters that are unrelated to effects on the natural resources or land or water uses of the coastal zone need not be considered by Federal agencies in deciding whether a consistency determination is required. In other words, only the effects of a federally-conducted or supported activity that are interrelated with the effects on the natural resources or land or water uses of the coastal zone may be considered for consistency purposes, and only if such effects are considered significant.

Finally, the Committee intends to incorporate relevant language from the CEQ regulations and case law defining "significantly affecting" to serve as the test for determining when consistency ap-

plies to a Federal activity. The Committee does not intend, however, that additional requirements of NEPA ("major Federal actions significantly affecting the quality of the human environment") for determining whether an environmental impact statement (EIS) should be prepared should also apply to consistency. Because NEPA's triggering test is different from the trigger for section 307(c)(1), the need (or lack of need) for an EIS does not necessarily determine whether consistency review should occur.

NATURAL RESOURCES OR LAND OR WATER USES

As reported, S. 2324 adds to the existing statute the phrase "natural resources or land or water uses in the coastal zone". This change clarifies congressional intent concerning the appropriate focus of section 307(c)(1). By adding this phrase, the Committee sharpens the focus of the act and thereby addresses concerns that the existing language in the statute, "activities directly affecting the coastal zone," could imply that social or cultural effects, by themselves and unrelated to the natural resources or land or water uses of the coastal zone, might trigger application of the consistency provision. Although the Committee notes that this has not been a problem in the past, S. 2324 focuses section 307(c)(1) on the resource or land or water use management objectives of the CZMA as stated in the Congressional Findings and Declaration of Policy sections of the CZMA.

The fact that the consistency provisions of the CZMA apply to natural resources or land or water uses is supported by both the statute and regulations. Natural resources in the coastal zone include land, water, and air and the living and nonliving resources contained therein. Examples of such natural resources include wildlife habitats, pristine regions, and those resources being preserved for future generations. Land or water uses of the coastal zone, as defined in section 304(10) and (18) of the CZMA, would include, among others, industrial, recreational, commercial, and military uses and the shoreside facilities associated with such uses. For example, marine transportation, commercial fishing, oil and gas activities and facilities, and harbor dredging are all land or water uses covered under section 307(c)(1). The Committee recognizes that Federal activities outside of the coastal zone—for example, OCS lease sales—can adversely affect coastal industries, such as commercial fishing, because of the physical impacts on ocean resources. It is the intent of the Committee that such activities affecting coastal industries be covered under section 307(c)(1).[1]

FULLY CONSISTENT

As reported, the bill requires that Federal activities significantly affecting the coastal zone be conducted in a manner "fully consistent" with approved State coastal management programs. The current stature requires that Federal activities directly affecting the coastal zone be "consistent to the maximum extent practicable"

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[1]The Committee's intention is to remedy the effects of the contrary interpretation by the Federal district court in *Kean* v. *Watt*, No. 82 Civ. 2420, oral op. at 37-44 (D.N.J. Sept. 7, 1982), appeal dismissed (3d Cir. 1984).

with State coastal programs. Commerce regulations (15 CFR 930.32) define "maximum extent practicable" to mean fully consistent with two exceptions.

Under the current regulations, Federal activities must be fully consistent unless "compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations" or if "deviation is justified because of some unforeseen circumstances arising after the approval of the management program which present . . . a substantial obstacle that prevents complete adherence . . ."

The bill, as reported, retains the first exception in the current regulations to allow a Federal agency to undertake an activity when it is required to do so by Federal law preventing consistency with a State program. Although the Committee has not incorporated the language of the second exception (unforeseen circumstances) in S. 2324, it has provided exceptions for national emergencies and actions undertaken by the Secretary of Defense for national security reasons. However, Federal activities falling within the exceptions may deviate only so far as is justified by the presence of such circumstance. In short, use of the term "fully consistent" is not a more stringent standard than the existing statutory language of consistent "to the maximum extent practicable," and Federal agencies are expected to exercise their discretionary authority in order to achieve consistency with State management programs. These programs have been developed under the guidance of the Secretary of Commerce, have been reviewed by Federal agencies and subsequently approved by Federal officials, must meet standards for continuing Federal approval set by Federal officials, and are, in large part, federally-funded and subject to substantial Federal control. It is only reasonable that Federal agencies be required to meet such federally-mandated standards.

The controversial history and alleged ambiguity of the term "maximum extent practicable" leads the Committee to substitute the phrase "fully consistent" in its place. The Committee's intent is to return to the States the role they had under the CZMA Federal consistency provisions prior to the Supreme Court decision in *Secretary of Interior* v. *California.* The Committee's intent is to make clear that the treatment given to full consistency in the existing Commerce regulations is proper and that the approach embodied in the decisions of the Courts in *Secretary of Interior* v. *California* is not appropriate. Use of the term "fully consistent" does not expand the role the States held prior to the Court decision. It merely substitutes a better and clearer phrase for one which lacked clarity and which has been subject to misinterpretation by Federal agencies and the courts.

ENFORCEABLE, MANDATORY POLICIES

The bill, as reported, requires a Federal agency conducting or supporting an activity significantly affecting the coastal zone to conduct that activity in a manner fully consistent with the "enforceable, mandatory policies of approved State management programs."

The Committee includes the phrase "enforceable, mandatory policies" to make clear that standards or recommendations incorporated into a State's coastal management program need only be given adequate consideration in determining Federal consistency with State programs. They are not to be considered binding. However, Federal activities must be fully consistent with the policies relevant to State constitutional provisions, laws, regulations, and judical decisions which comprise a State's management program. The phrase is relevant in large part to program policies worded as "shall or will," and which are enforceable under State law.

The existing Commerce regulations (15 CFR 930.39) already include similar provisions instructing Federal agencies to give appropriate weight to the various types of provisions within State management programs. The Committee believes incorporating the "enforceable, mandatory policies" language will clarify and emphasize the Federal Government's responsibilities in complying with the consistency provisions of the CZMA.

The Committee has worked to address concerns that States will use vaguely worded policy statements to use consistency to assert control over certain Federal activities not related to the natural resources or land or water uses of the coastal zone. As outlined elsewhere in this report, the bill, as reported, focuses on resource or land or water use management issues. The Committee intends the use of the phrase "enforceable, mandatory policies" to be tied to the resource or land or water use management policies of the States which have been incorporated in approved coastal management plans pursuant to sections 305, 306 and 307(f) of the CZMA.

Federal agencies and courts should give substantial deference to a State's interpretation of the "mandatory, enforceable policies" of that State's program. Leaving interpretations of the policies to the individual Federal agencies would result in diverse applications of Federal consistency to State programs. A strong consideration of a State's view would insure uniformity in applying consistency to the range of Federal activities covered.

The Committee also endorses NOAA's current regulation (15 CFR 930.39(d)) addressing the situation in which Federal agency standards are more protective than standards or requirments in a State program.

EXCEPTIONS

As explained above in item 3, the bill spells out the exceptions to full consistency. A Federal agency which believes that an activity falls within an exception bears the burden of establishing how the exception applies.

Declaration of a national emergency

The bill as reported provides that a Federal activity "undertaken to counter the immediate effects of a national emergency declared by the President" may deviate from the requirement of full consistency to the extent justified by such circumstance.

The language of the bill is straightforward. In the event of such circumstances as described above, the Federal agency shall prepare a consistency determination that explains why it is necessary to de-

viate from full consistency and how such deviation is only to the extent justified by the Presidentially declared national emergency.

National security

In addition to exempting from full consistency Federal activities carried out to counter the immediate effects of a national emergency, the bill, as reported, provides also that DoD activities determined by the Secretary of Defense to be necessary for reasons of national security may deviate from full consistency. It is the Committee's intent to clarify language in the current commerce regulations (15 CFR 930.32(b)) that allow Federal agencies to deviate from full consistency with an approved management plan because of some unforeseen circumstances. The Committee recognizes that, as in the case of declared national emergencies, there may be instances where substantial obstacles may arise preventing DoD activities necessary for reasons of national security and significantly affecting the coastal zone from achieving full consistency.

A number of military activities carried out by the DoD have not required consistency review because they did not "directly affect" the coastal zone. The Committee believes that these activities remain outside the scope of section 307(c)(1) because they do not significantly affect the natural resources or land or water uses of the coastal zone.

Specifically, the Committee intends that training and exercises of the DoD, such as amphibious exercises, aircraft take-offs and landings, troop maneuvers, and delivery of munitions are not subject to CZMA consistency review. Further, operations of the DoD such as troop movements, homeporting changes, aircraft basing, mission changes, and ship movement in and out of port and offshore are not subject to consistency review. Ship repair, master planning, and maintenance duties that are unique to the military that have not required preparation of a consistency determination under section 307(c)(1) of the CZMA would likewise not significantly affect the natural resources or uses of the coastal zone.

The Committee considers that activities not unique to the military, such as Army Corps of Engineers' projects and planning and construction projects, significantly affecting the coastal zone would continue to be subject to CZMA consistency requirements.

Federal compliance prevented by existing law

The bill, as reported, requires a Federal activity to be fully consistent with a State management program unless a provision of Federal law prevents such consistency. However, even in such a case, the Federal activity "may deviate from full consistency only to the extent justified by the presence of such circumstance".

A Federal agency must clearly describe to the State agency the statutory provision or other legal authority which limits the Federal agency's ability to comply fully with the provisions of the management program.

This Committee believes, for reasons stated above, that section 307(c)(1) of the CZMA requires Federal agencies to make changes in their decisionmaking processes, and to exercise their discretionary authority under their various statutory and regulatory mandates to

achieve consistency with Federal-approved coastal management programs.

The existing Department of Commerce regulations on consistency address this issue. Those regulations (15 CFR 930.39) provide adequate standards and guidelines for Federal conduct in instances where full compliance is prevented by existing law. The Committee believes this issue is of major importance and has therefore incorporated significant elements of the existing regulation into the Act.

MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT

The bill specifically provides that activities undertaken pursuant to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 et seq. (the "MFCMA"), are not subject to the Federal consistency requirements of the CZMA.

The MFCMA establishes a delicately-balanced institutional arrangement for fisheries management. It already is designed fully to accommodate State interests, consistent with the need to manage fishery resources on a regional basis. In the Committee's judgement, application of the Federal consistency requirements to the fishery management process is unnecessary and potentially disruptive.

The primary mechanism for fishery management under the MFCMA is the Regional Fishery Management Councils. The Councils are a unique form of government. They are not composed of Federal officials distant from the resource. Rather, they are comprised of State representatives, including the principal State official with marine fishery management responsibility and expertise in each constituent State. Representatives of State interests, in short, are collectively the responsible decisionmakers in the fishery management process. However, they must manage fishery resources on a regional basis, and no single State is permitted to dominate the management process.

CZMA consistency would add little, if anything, to this process. At the same time, the Committee believes that it would be unwise to allow any single State, through a mechanism such as Federal consistency, to assert its own fishery management objectives over and against those determined by a Council to make sense on a regional basis. The Committee is convinced that, were Federal consistency to be applied to the fishery management process, it would lead to numerous controversies, largely over allocation questions, between the Councils and user groups and/or States disappointed with Council decisions. Such a result would risk upsetting the balance which Congress struck in 1976 between State, regional and Federal interests under the MFCMA.

In addition to providing for the management of domestic fishing activities, the MFCMA provides for the management of foreign fishing. This international component involves both allocation decisions made by the Secretary of State and decisions regarding particular management measures applicable to foreign fishing fleets. Necessarily, these decisions often balance foreign policy considerations with domestic management needs. Examples are the exclusion of the Soviets from the U.S. Fishery Conservation Zone following the invasion of Afghanistan, and reduction of Japanese alloca-

tions because of their whaling practices. The Committee judges it inappropriate to permit the States, through the mechanism of section 307(c)(1) consistency, to seek to dictate the outcome of such questions for parochial political purposes. Consequently, the bill makes clear that all MFCMA activities are excluded from the consistency requirements.

The Committee emphasizes that its determination to treat fisheries management in this manner creates no precedent for treating Federal activities under other statutes in a similar fashion. The Committee does not view the MFCMA exemption as a weakening of the Federal consistency provision of the CZMA. Rather, its treatment of the MFCMA is simply a recognition that State interests already drive the decisionmaking process as well as the need to ensure that regional fisheries management is effectively maintained and that U.S. foreign policy is conducted without interference from individual States. The MFCMA's unique statutory scheme justifies this approach.

Votes in Committee

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following votes during its consideration of S. 2324:

Senator Gorton offered an amendment to exempt all Federal activities carried out pursuant to the Manguson Fishery Conservation and Management Act from section 307(c)(1) of the CZMA. The amendment was adopted by voice vote.

Senator Stevens moved to postpone Committee consideration of S. 2324. On a roll call vote of 6 yeas and 9 nays, the Stevens' motion was defeated.

YEAS—6	NAYS—9
Goldwater [1]	Packwood
Pressler	Kassebaum
Stevens	Gordon
Kasten [1]	Trible
Long	Hollings [1]
Exon	Inouye [1]
	Ford
	Riegle [1]
	Lautenberg

[1] By proxy.

Chairman Packwood moved to report S. 2324 with an amendment in the nature of a substitute.

On roll call vote of 9 yeas and 7 nays, S. 2324, with an amendment in the nature of a substitute and an amendment to the title, was ordered favorably reported.

YEAS—9	NAYS—7
Packwood	Goldwater [1]
Kassebaum	Danforth [1]
Gorton	Pressler
Trible	Stevens
Hollings [1]	Kasten [1]

Inouye [1]	Long
Ford	Exon
Riegle [1]	
Lautenberg	

[1] By proxy.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

THE COASTAL ZONE MANAGEMENT ACT OF 1972

SEC. 307. (a) — (b) * * *

[(c)(1) Each Federal agency conducing or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.]

(c)(1)(A) Each Federal agency conducting or supporting an activity significantly affecting the natural resources or land or water uses in the coastal zone shall conduct or support that activity in a manner which is fully consistent with the enforceable, mandatory policies of approved State management programs, unless the Federal activity is——

(i) undertaken to counter the immediate effects of a national emergency declared by the President;

(ii) undertaken by the Secretary of Defense and is necessary for reasons of national security;

(iii) required by any provision of a Federal law which prevents consistency with any provision of an approved State coastal zone management program; or

(iv) undertaken pursuant to the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).

In the event that achievement by a Federal agency of full consistency is prevented by a circumstance described in clause (i), (ii) or (iii) of this subparagraph, the agency may deviate from full consistency only to the extent justified by the presence of such circumstance.

(2) — (3) * * * *

(d) — (h) * * * *

MINORITY VIEWS OF MR. STEVENS

In 1972, Senator Hollings and I led the effort to give the individual State the authority to manage their coastal zones, an authority they locked under constitutional law. The need for effective control in the Nation's coastal zone is essential. It is in the coastal zone that one can recognize the limited resources of our lands, the host of competing demands, and the disorderly—and ofttimes tragic—development that occurred prior to enactment of the the Coastal Zone Management Act (CZMA). In that bill, CZMA, we established a mechanism enabling State and lacal governments to plan the orderly protection and development of their biologically productive and commercially invaluable coastal areas.

At the same time that it is important for the States to be able to manage the development of their coastal zones, we must be wary of control mechanisms that encourage individual State vetoes of Federal lease sales. S. 2324 as reported, would amend the Coastal Zone Managemental Act to mandate "full consistency" of all Federal activities "significantly affecting" the coastal zone. It has been argued that S. 2324 would provide additional leverage to enhance the state's role in negotiations over tracts to be offered under the 5-year Outer Continented Shelf (OCS) lease scheule. In the case of Lousisana, Texas, and Alaska, this is probably accurate—these States have supported an active Federal leasing program because such lease sales are perceived to be in the best interest of the individual State as well as the Nation.

However, if S. 2324 is enacted, some States will seize upon it as a device to assert veto authority over the selection of OCS tracts for leasing, as well as a virtually unlimited range of Federal activities. These States could base such a veto on aesthetic reasons—not on resource conflicts which concerns me as an Alaskan Senator. Under this legislation, some coastal States would opt out of the OCS Leasing Program—increasing the burden on Alaska and the few States, primarily Louisiana and Texas, which presently bear the lion's share of OCS development. Should the energy crisis rear its head again, Congress would have little choice but to repeal S. 2324 to expedite exploration and development of the OCS.

Alaska with over one-half of the Nation's OCS, has a great deal to lose should the United States be forced into a crash OCS leasing program due to world oil supply shocks.

S. 2324 is touted as a measure designed to avoid litigation. To the contrary, this legislation is a lawyer's dream. The potential for incessant litigation is supported by a review of the language of the bill—it requires that Federal activities be "fully consistent" with the State's management program. In addition, bringing suit under S. 2324 is not limited to a State entity—virtually anyone could sue to enjoin Federal actions affecting the coastal zone. Due to the

vague nature of Coastal Zone Management (CZM) plans, this provision insures litigation on virtually every lease sale.

Presently, there is an orderly system of negotiation and consultation encompassing leasing, exploration, production and development of OCS resources. Under the Outer Continental Shelf Lands Act (OCSLA) State consultation is assured by section 19, which requires the Department of the Interior to accept the state's leasing recommendation unless they do not provide for a proper balance between State and national interests. I strongly advocate the inclusion of this section in the 1978 OCSLA amendments, as did the State of Alaska. Interestingly enough, since the passage of section 19, Alaska has not filed a suit against Interior to challenge an OCS lease sale.

Further, on the subject of State input, the National Environmental Policy Act (NEPA) provides for consultation through scoping and State comments on draft environmental impact statements at the lease stage. Other Federal laws, including the CZMA, the Endangered Species Act, the Clean Water Act, the Administrative Procedure Act, and the Clean Air Act, insure substantial state participation at the exploration, development, and production stages. Consequently, S. 2324 is not necessary to preserve State consultation with regard to Federal decisions on the OCS lease schedule.

Nine Federal OCS lease sales (including one resale) have been held in Alaska in the period from 1976 through the end of 1983. In negotiations with the Department of the Interior conducted before the Supreme Court's CZMA decision, the State of Alaska was able to secure substantial modifications in the Department's OCS leasing plans.

For example, the Norton Basin sale in the spring of 1983 was held pursuant to a Memorandum of Agreement (MOA) between the Department and the State, which provided for State concurrence in important exploratory, transportation, and discharge issues and State review of oil spill contingency plans for consistency with Alaska's Coastal Zone Management Program. The Interior Department also agreed to defer the sale of 11 tracts near the Yukon River Delta and to add stipulations concerning drilling seasons and other important matters.

The Interior Department has not turned a deaf ear to Alaska's concerns since the Supreme Court's decision in Secretarry of the *Interior* v. *California*. In fact, the State of Alaska, working together with the Alaska Congressional Delegation, secured the most substantial changes in the federal OCS leasing plan to date—changes which were announced after the Supreme Court's decision. Among other changes, the Interior Department deleted the Barrow Arch Sale from the current 5-year schedule, deleted 83 percent of the North Aleutian Basin Sale, and eliminated nearly half of the planning area for the second Diapir Field sale. These changes constitute a substantial reworking of the Federal OCS lease program in Alaska and will reduce the number of Federal OCS sales in Alaska to no more than three per year.

This should not be taken to suggest that all of the concerns Alaskans have expressed over OCS leasing have been addressed. Nevertheless, the fact is that Interior substantially modified its leasing

plans to meet State concerns even after the threat of CZMA litigation had been removed by the Supreme Court's decision.

In addition, S. 2324 contains a provision that allows for the suspension of the consistency requirement for Federal activities "undertaken to counter the immediate effects of a national emergency declared by the President." Consequently, should we face another energy crisis, we could be forced to greatly accelerate the exploration and development of the OCS. In effect, S. 2324 has the potential of setting the stage for a frenzy of OCS development—thereby greatly increasing the likelihood of a mishap. The present OCS leasing schedule and consultation process incorporate the need to explore the OCS in an orderly and reasonable manner for America's energy security. S. 2324 would destroy the balance between State parochial interests and our Nation's energy needs—passage of this legislation is short-sighted and perilous to the safe utilization of the States' coastal zones.

Finally, to me the basic problem of S. 2324 is that it would destroy the working relationship between the State and Federal executive managers. If a State will veto any OCS activity which does not meet 100 percent of its demands, no Federal-State dialogue will be maintained. The Federal position will ultimately be sustained on the grounds of national security considerations. Under S. 2324, the States, not our National Government, will be the ultimate losers.

For these reasons and others, I voted against S. 2324.

TED STEVENS.

MINORITY VIEWS OF MESSRS. STEVENS, LONG, AND GOLDWATER

In *Secretary of the Interior* v. *California*, 104 S.Ct. 656 (1984), the Supreme Court held that section 307(c)(1) of the Coastal Zone Management Act (CZMA) did not apply to the leasing stage of an Outer Continental Shelf (OCS) project. Central to the court's conclusion was its recognition that OCS leasing itself does not have any physical impacts upon the coastal zone and that the subsequent stages of an OCS project which give rise to the possibility of impacts are explicitly subject to section 307 (c)(3)(B) of the CZMA.

S. 2324 was introduced for the avowed purpose of reversing the Supreme Court's construction of section 307(c)(1). However, far from limiting its impact to that case, this bill radically revises section 307(c)(1) in a way that could well cripple the Nation's OCS leasing program, as well as a host of other Federal programs which would be brought within the greatly expanded scope of section 307(c)(1).

S. 2324, as reported, deletes the "directly affecting" language of the section, and substitutes the much broader "signficantly affecting" language borrowed from the National Environmental Policy Act (NEPA). This change extends the CZMA power of States over federal activities to the full range of actions whose environmental impacts are presently subject to NEPA. In addition, S. 2324 deletes the "maximum extent practicable" qualification to a Federal agency's obligation to comply with State CZMA programs, and instead requires "full consistency" except in a very limited range of circumstances. Taken together, these two changes in section 307(c)(1) potentially represent an unprecedented transfer of control over Federal activities to the States.

All of this is accomplished without any guidance as to the extent of the authority being conveyed to the States, the procedures and standards for judicial review to resolve the countless controversies that will arise between the federal and Stage governments, or the creation of an administrative mechanism to resolve those disputes. If S. 2324 is enacted, not only will the OCS program be bogged down in litigation, but also such diverse matters as water diversion projects in inland States which ultimately affect rivers at their mouths, activities on the high seas dependent upon coastal bases, Federal coal leasing projects using transshipment ports, and a myriad of other activities conducted, approved, or funded by the Federal Government will be subject to State CZMA review and subsequent litigation concerning the legal significance of that review.

A majority of this Committee doubtless support this bill in a good faith response to the pleas of several coastal States for "participation" in the planning stages of federal activities. If States could play a role in shaping the scope of an OCS project or other federal activities only through an expanded version of section

307(c)(1), then we, too, might support some amendment of the statute. States clearly have a vital interest in the management of their coastal zones.

However, States are guaranteed consultative authority on OCS leasing under section 19 of the OCS Lands Act (OCSLA) and, indeed, at the later stages of an OCS project, have clear authority to ensure that they are carried out in accordance with State CZMA policies. Under the Administrative Procedure Act (APA), all Federal decisionmakers consider fully all relevant matters brought to their attention. Further, NEPA ensures State input into all Federal projects. And, of course, section 307(c)(1) continues to apply to Federal activities which, in fact, "directly affect" a State's coastal zones. The Supreme Court's holding that, in the light of its special historic and operational circumstances, OCS leasing does not "directly affect" State coastal zones, does not settle the issue as to whether other Federal activities which, in fact, directly impact State coastal zones are subject to section 307(c)(1).

Thus, S. 2324 is not necessary to insure State consultation with respect to Federal decisionmaking. In fact, like section 307(c)(1) itself, S. 2324 makes no mention of consultation. Instead, it is a directive that Federal activities which significantly affect the natural resources for land or water uses in the coastal zone "shall" be conducted in a manner that is fully consistent with State CZMA programs. What is at stake in the consideration of this bill is not consultation, but the exercise of authority over the conduct of Federal activities.

If enacted, some coastal States would probably use this legislation to bring the leasing programs off their coastlines to a virtual standstill. This, in turn, would exacerbate pressures to drill off Alaska, Louisiana, and Texas, currently bearing the lion's share of Federal OCS development.

Moreover, since environmental groups and local governments have been held to have standing to sue under section 307(c)(1),[1] the enactment of this measure would arm private parties with the means to file delaying lawsuits against the Federal Government. Consequently, even in the instances when coastal States conclude that a lease sale is in its own parochial interests, third parties could effectively stymie a Federal/State accord. For the Congress to adopt any amendment to the CZMA that would have these consequences would be a tragic mistake.

In providing specific examples to document this conclusion, we will rely principally upon the impact of S. 2324 upon the OCS program, since this is the primary target at which the bill is aimed. However, the specific observations which we make about OCS activities are generally applicable to the bill's impact upon a wide range of other Federal programs. As is attested by the letters filed with the Committee by the Department of Justice, the Department of the Navy, the Department of the Interior, DOT, and OMB, passage of S. 2324 threatens a broad range of Federal activities.

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[1] *California* v. *Watt*, 683 F.2d 1253, 1269–71 (9th Cir. 1982), rev'd on other grounds, 104 S. Ct. 656 (1984).

ULTIMATE STATE CONTROL OVER OCS LEASING AND OTHER FEDERAL ACTIVITIES WOULD DISSERVE THE NATIONAL INTEREST

The benefits of OCS leasing, like most other Federal activities, are national in scope. The Federal Treasury receives the large cash bonuses from OCS leases, annual rentals, and sizable royalties that accrue when OCS oil and gas are ultimately produced—to date, more than $59 billion.

Oil and gas produced on the Federal OCS—since 1954, more than 6 billion barrels and 58 trillion cubic feet respectively—is widely distributed to industrial, commercial and residential consumers across the land. Thus, the residents of all 50 States, both as Federal taxpayers and as consumers, have enjoyed the benefits of this production.

It is imperative that the United States continue, and, in fact, increase efforts to find and develop new domestic oil reserves. Unfortunately, all the attention to the "world oil glut" has created the impression that America need not be overly concerned with its petroleum or other energy supplies either now or in the future. Such an impression about the status of our Nation's energy policy ignores the lessons of 1970's, ignores the long lead time from exploration to production, and ignores America's present vulnerability to substantial economic shocks from events we cannot control in the other oil-producing areas of the world.

When the Arab oil embargo began in 1973, the United States was importing about one-third of its oil—about 6 million barrels a day. Despite the drastic increases in oil prices, imports continues to rise to 10 million barrels per day in early 1977. Since then, oil imports have gradually declined to their bottom level of 4 million barrels per day last February and March. However, imports have increased to the point where we once again import one-third of our daily consumption.

Meanwhile, if we exclude Prudhoe Bay, Alaska, the total U.S. reserve base has been declining at the rate of approximately 1 billion barrels per year. Moreover, the cost of oil is no longer at 1973 levels—the oil we imported in 1973 cost about $8 billion; it now costs about $52 billion. This is a serious economic drain on the United States and a serious risk to our national security.

Oil and gas from the OCS is our most immediate hope for restoring America's energy independence. Yet our OCS production has fallen off by one-third in the last few years. American OCS production levels are among the lowest of all oil producing nations.

In light of the present war between Iran and Iraq, and the potential for other oil supply shocks in other oil producing areas of the world, it is imperative that America not abandon the effort to enhance our ability to meet future shocks to the world oil supply.

Technological advances and rigorous controls enforced by the Federal Government have reduced to de minimis levels the risks of large oil spills; since 1970 over 4 billion barrels of OCS oil have been produced with no major oil spills. Nevertheless, some coastal States continue to raise the spectre of such "worse-case" events to oppose OCS leasing. Since these States receive only their proportionate share of the national benefits of OCS leasing, they tend to depreciate those benefits. Consequently, we find ourselves with a

very few States shouldering the vast majority of Federal OCS development.

Understatement of national benefits and overstatement of local costs is not limited to OCS projects. It is only natural to assume that, in connection with any Federal project, local officials will be far more attuned to the concerns of their constituents with the local impacts of these activities than to their national benefits, which States must ultimately share with others.

Thus, vesting authority in the States with respect to OCS leasing will, in all likelihood, retard the development of at least some OCS lands. Such action would defy the findings made by Congress when it declared that the United States was in increasing peril because of its dependence upon uncertain foreign oil supplies and thus adopted the 1978 OCSLA to permit "expedited exploration and development of the [OCS] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade."

Turning over control of OCS leasing to individual coastal States would contravene other vital goals articulated in the 1978 OCSLA. One of the principal accomplishments of those amendments was the requirement that the Secretary of the Interior develop a 5-year OCS leasing program which would, among other things, be based upon consideration of

> (B) an equitable sharing of developmental benefits and environmental risks among the various regions;
>
> (C) the location of such regions with respect to, and the relative needs of, regional and national energy markets;
>
> (D) the location of such regions with respect to other uses of the sea and seabed, including fisheries, navigation, existing or proposed sealanes;
>
> (G) the relative environmental sensitivity and marine productivity of different areas of the [OCS].

OCSLA Section 18(a)(2), 43 U.S.C. Section 1344(a)(2).

To respond to these requirements, both Secretaries Andrus and Watt published 5-year leasing programs, which the courts ultimately upheld as achieving the "equitable sharing" among regions and other goals recited in the OCSLA.[2] Permitting individual coastal States to invoke their CZMA programs to bar lease sales which, in their view, might affect resources of particular concern to them would destory the balance achieved in the leasing program. Indeed, it could well lead to OCS leasing taking place only off a few States—with the balance struck in the leasing program being shelved because of individual State political processes. In turn, this will lead to increased pressure on a few States to bear the entire burden of OCS development.

Again, the imbalance which would be created in the OCS program by virtue of the exercise of State CZMA authority represents only one aspect of a more general phenomenon. Individual Federal activities are often conducted as part of a comprehensive program based on relatively uniform application throughout the United

[2] *California* v. *Watt*, 668 F.2d 1290 (D.C. cir. 1981), 712 F.2d 584 (D.C. Cir. 1983).

States. Affording coastal States selective opportunities to nullify aspects of those programs, because, under the State's view of the matter, the local costs outweigh the national benefits would lead to distortions of many federal programs.

S. 2324 WILL FORMENT LITIGATION

S. 2324 is touted as avoiding litigation. To the contrary, its adoption will give rise to incessant litigation. The last invocation of the CZMA to bar OSC leasing, prior to the Supreme Court's ruling, bear this out.

For OCS Sale No. 73, the Secretary of the Interior consulted with California's Governor pursuant to section 19 of the OCSLA, 43 U.S.C. section 1345. The Governor recommended that Interior delete some near-shore tracts and impose lease stipulations on the others dealing with such things as air quality and oil pipelines. The result of this consultation was a Memorandum of Agreement (MOA) between California and Interior providing for the deletion of the near-shore tracts and the adoption of all the lease stipulations sought by California. In signing the MOA, California stated that these modifications would "accomplish the necessary balance between production of needed oil and gas and protection of our valuable environmental resources."[3]

Nonetheless, the California Coastal Commission, (CCC), the independent agency which administers California's CZMA program, subsequently filed suit challenging Interior's compliance with California CZMA program and obtained an injunction against the entire sale, which the Supreme Court ultimately stayed.

Several aspects of this California case highlight the litigation-inducing potential of S. 2324:

First, in California, as in many other States, it is possible either for the coastal planning agency or the State's attorney general to sue without the Governor's approval.

Second, although the Department's regulations instruct States that they "should list in their management programs Federal activities which . . . are likely to directly affect the coastal zone," 15 C.F.R. section 930.35(c), California did not so list OCS leasing. Thus, there was no provision in the California program giving any indication that the State would oppose OCS leasing.

Third, no precise standards were recited against which to measure a lease sale's consistency with the program. Thus, the courts had before them merely California's assertion that its program barred leasing and the contrary contentions of the Secretary of the Interior.

The lack of CZMA program standards bearing on OCS leasing and the lack of defined procedures for the resolution of CZMA disputes under section 307(c)(1) invite anyone with appropriate authority in a State CZMA agency, an attorney general's office or, indeed, even the myriad local governments potentially affected by an OCS sale to challenge OCS leasing under the CZMA.

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[3] Letter from G. W. Duffy, Secretary of Environmental Affairs, to James Watt, Secretary of the Interior (Oct. 6, 1983).

With perhaps an even greater impact, recognition by the courts that so-called "public interest" litigation groups have standing to invoke section 307(c)(1) means that they can sue under the expanded version of the section that would emerge from S. 2324 to attempt to halt any Federal activity having a nexus withthe coastal zone. The plethora of the NEPA-based lawsuits to enjoin Federal projects, which have arisen out of the vague and general terms of that statute, clearly foreshadow a similar invocation of the comparably expansive terms of the CZMA, as it would be amended.

S. 2324 WILL FRUSTRATE EXISTING CONSULTATIONS PROCEDURES

The history of the California case shows that there is ample and effective opportunity for OCS leasing consultation without direct application of the CZMA. Under section 19(a) of the OCSLA, 43 U.S.C. section 1345(a), Governors are entitled to make "recommendations" to the Secretary of the Interior concerning the "size, timing or location" of OCS leasing, which the Secretary must accept unless he determines that they do not provide for an adequate balance between the national and State interests.

Moreover, if he make such a determination, the Secretary must communicate to the Governor, in writing, the reasons for his decision, after an opportunity for consultation to implement alternatives that would strike a reasonable balance between these interests. Finally, OCSLA section 19(d) provides explicit procedures for judicial review of the Secretary's action upon these recommendations, making it "final" unless found to be "arbitrary or capricious."

These procedures have worked well in many States to assure adequate consultation. Alaska, for example, has participated constructively in the section 19 process with Interior and has achieved modifications of leasing proposals which, either in whole or substantial measure, have met the State's concerns. As a result, Alaska has not filed a single suit to challenge an OCS lease sale since section 19 was adopted.

Moreover, NEPA provides a means of consultation for the States with respect to all Federal activities. In the scoping process that precedes preparation of an environmental impact statement (EIS), State and local governments are given a voice in the topics to be covered by the EIS. Subsequently, they are invited to provide detailed comments on the draft EIS. Typically, every agency of a State government whose mission is in any way affected by a Federal project makes its view known as to policy and environmental aspects of the project. Thereafter, the Federal agency is obliged by NEPA to respond to all pertinent comments. In doing so, it often modifies the conclusions reached in the draft EIS.

S. 2324 IS NOT NECESSARY FOR ENVIRONMENTAL PROTECTION OF THE COASTAL ZONES

There is a full range of Federal environmental laws, such as NEPA, the Endangered Species Act, and the Clean Water Act, which apply to all Federal activities that may in any fashion impact the coastal zone. For example, OCS activities must comply with 74 sets of Federal regulations in achieving an appropriate balance between industrial activity and environmental protection.

Thus, S. 2324 would not enhance the degree of environmental protection afforded to the coastal zone. It would, instead, add a layer of State decisional authority on top of the exhaustive Federal controls which already protect the coastal zone.

S. 2324 IS NOT NECESSARY TO PROTECT THE INTEGRITY OF CZMA PROGRAMS

In 1972 when the CZMA was enacted, Congress had not "provide[d] for the problems that States began to anticipate in conjunction with increased energy-related activities in the coastal zone;" the 1972 CZMA gave the States "no part in any decision concerning development on the [OCS] * * *."[4] The 1976 amendments to the CZMA addressed this issue, and revised section 307(c)(3) to make it apply explicitly to the exploration and production/development plans submitted by OCS lessees. In doing so, the conference committee rejected a proposal to apply section 307(c)(3) to OCS leasing and instead stated that it was applying

> The consistency requirement to the basic steps in the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior.[5]

The conference report went onto state that

> [t]his provisions will satisfy state needs for complete information, on a timely basis, about the details of the oil industry's offshore plans.[6]

Section 307(c)(3), as amended in 1976, continues to satisfy that need. At the exploration and development-production stages, when specific operational plans are laid, the States can apply their CZMA programs and demand specific adjustments to assure consistency with those programs. Once an OCS lessee has discovered oil or gas on its tract and proposed a specific route or a pipeline, a State can properly invoke the policies of its CZMA program to protect fragile coastal resources by directing the rerouting of a pipeline to a less sensitive area. This process constitutes "management" of the coastal zone.

At the OCS leasing stage, however, the State is confronted with no specific operational plans. It can, at this point, only invoke a veto authority denying the possibility that any future arrangements might be consistent with its program. The casting of such a veto does not represent management of the coastal zone; it is, instead, an attempt to manage the OCS itself.

THE SPECIFIC AMENDMENTS EFFECTED BY S. 2324 ARE MISCONCEIVED

While any amendment to section 307(c)(1) to expand State authority is objectionable, the specific amendments proposed in S. 2324 are especially misconceived.

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[4] H. Rept. 1012, 96th Cong., 2d sess. 26-27 (1980).
[5] S. Conf. Rept. 987, 94th Cong., 2d sess. 30 (1976).
[6] Id.

(1) Significantly affecting

As enacted in 1972, section 307(c)(1) was drafted to apply only to Federal activities "directly affecting the coastal zone." Congress' choice of "directly affecting" was clearly intended to restrict the range of federal activities subject to the act. The common meaning of the term "directly"—i.e., "simultaneously;" "without any intervening agency or instrumentality;" "without any intermediate step;" "without a moment's delay;" "at once, immediately" [7]—clearly suggests that only those federal activities having a clear and immediately nexus with the coastal zone would be subject to section 307(c)(1).

Moreover, the entire jurisdiction for allowing States to apply their CZMA programs to Federal activities turns upon the opportunity of federal agencies to comment upon those provisions of proposed programs which might later hamper the Federal agency's activities. Reliance upon this opportunity for comment clearly implies the Federal agency's ability to foresee which of its activities would be potentially subject to the CZMA program at issue.

S. 2324, as adopted by the Committee, expands the scope of the statute beyond the point where Federal agencies during the program approval process could possibily determine which of their activities might be restricted by a CZMA program. The phrase "directly affecting" has been deleted, and in its place the phrase "significantly affecting the natural resources of or land and water uses of" has been substituted. The majority report explains that the "significantly affecting" term takes its meaning from NEPA and its implementing regulations. Those regulations make clear the expansive reach of that phrase.

> Pursuant to 40 C.F.R. section 1508.3, under NEPA the phrase " 'affecting' means will or may have an effect on." The NEPA regulations then define "effects" to include both "direct" and "indirect effects." 40 C.F.R. section 1508.8. The regulations emphasize the breadth of the term "effects":
>
> "Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." Id.

The term "affecting" is not narrowed to any appreciable degree by the term "significantly." The NEPA regulations provide that "'significantly' as used in NEPA requires consideration of both context and intensity," 40 C.F.R. section 1508.27—e.g., whether unique characteristics of an area are involved; the degree to which the effects are likely to be "highly controversial;" the degree to which risks are "highly uncertain or involve unique or unknown risks;" etc. 40 C.F.R. 1508.27(b).

Having tied the operation of the CZMA to the language of NEPA, it must be assumed that CZMA review will be required for

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[7] Webster's New International Dictionary (unabridged 3d ed. 1971)

every Federal activity, which has some arguable nexus to the natural resources of our land or water uses within the coastal zone, whenever NEPA would require the preparation of an impact statement. Surely construction of an inland highway, which makes coastal beaches more accessible to a land-locked city, would have to be assessed for consistency. The same is presumably true of Federal loans or loan guarantees to small businesses if Federal monies may ultimately be used to construct projects within the coastal zone. Even Federal regulations which have the potential to affect hunting or fishing of species, which at some point of their life cycle inhabit the coastal zone, will have to be assessed to assure that they are consistent with State policies that may foster such activities. Thus, adoption of the "significantly affecting" provision as set forth in S. 2324, as reported, extends the scope of section 307(c)(1) to limits which cannot be discerned.

(2) "Enforceable, mandatory," policies

Linking this broad consistency requirement to "enforceable" or "mandatory" policies of an approved State CZMA program, in the manner envisioned by S. 2324, does nothing to narrow the scope of the statute. Present CZMA regulations provide that

> Federal agencies must ensure that their activities are consistent to the maximum extent practicable with the enforceable, mandatory policies of the management program. However, Federal agencies need only give adequate consideration to management program provisions which are in the nature of recommendations. 15 C.F.R. section 930.39.

Thus, this aspect of the bill merely codifies existing regulatory law.

Moreover, the mandatory, enforceable policies of State CZMA programs are recited in such vague terms that they permit an expansive interpretation to reach many types of federal activities in ways never contemplated at the time those programs were approved. For example, Policy 9 of the Massachusetts CZMA program, a "regulatory" and thus "enforceable" provisions, states merely that Massachusetts will:

> Accommodate exploration, development, and production of offshore oil and gas resources while minimizing impacts on the marine environment, especially on fisheries, water quality and wildlife.

> At the time of Federal approval of the Massachusetts program, no Federal official could possibly have envisioned that Massachusetts would, as it later did, invoke this policy to assert that the leasing of OCS tracts located in deep waters far offshore Massachusetts was inconsistent with its program.[8]

Some coastal States have taken the position that deference should be paid to their construction of the vague and general provisions of their programs and that contrary interpretations by the af-

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[8] See *Conservation Law Foundation* v. *Watt*, 560 F. Supp. 561, 578 (D. Mass.), aff'd on other grounds, 716 F.2d 946 (1st Cir. 1983).

fected Federal agency should be ignored. For example, in the litigation concerning OCS Sale No. 73, California asserted that "the most significant consistency issue in this case is the question of who interprets" the California CZMA program.[9] California then asserted that: "substantial deference" should be paid to the interpretation of the CCC, while "the Department of the Interior's interpretation of California's management program is entitled to no weight whatsoever." [10]

Nothing in S. 2324 resolves this issue. The reference to "enforceable, mandatory" policies leaves unanswered the question of who has the decisive word in interpreting these policies. Should the courts ultimately rule that such authority resides in State CZMA agencies, S. 2324 would give them essentially unfettered discretion to restructure or even halt any Federal program affecting the coastal zone that falls within the vague terms of the "enforceable, mandatory" policies contained in their programs.

(3) "Fully consistent"

The other significant change which S. 2324 would make in existing law is the deletion of the "maximum extent practicable" qualification to Federal agencies' consistency responsibilities. Instead of affording agencies the flexibility implicit in that term, they would be required to conduct their activities in a manner that is "fully consistent" with State CZMA programs unless the activity is (i) undertaken to counter the immediate effects of a declared national emergency; (ii) conducted by the Department of Defense and necessary for reasons of national security; (iii) required by any provision of Federal law which prevents the conduct of an activity in a manner consistent with a CZMA program; or (iv) related to fishery management programs. Moreover, if exceptions (i), (ii) or (iii) are invoked, the Federal agency can deviate from full consistency only to the extent required by those exceptions.

The ninth circuit, whose decision was reversed by the Supreme Court, expansively construed the "directly affecting" provision of section 307(c)(1) to apply to OCS leasing. However, that Court coupled that ruling to a construction of "maximum extent practicable which recognized that the Secretary of the Interior must have flexibility when interpreting State CZMA programs:

> The statute does not provide that a state's plan takes precedence when it would preclude the federal activity, or even that the federal activity ust be as consistent with the plan as is *possible*. It only provides that the activity be consistent *to the maximum extent practicable* * * *. To hold otherwise on the basis of silence, or at best attenuated inferences drawn from the language of Congress, weighs too lightly the interests of the Nation against that of the state. 683 F.2d at 1264. (emphasis in original).

S. 2324 would not only overrule the Supreme Court's decision and reinstate that of the ninth circuit with respect to the application of section 307(c)(1) to OCS lease sales, but also it would deprive

[9] Memorandum dated Dec. 5, 1983, p. 14.
[10] Id. at 15.

the Federal Government of what the ninth circuit believed was essential flexibility in interpreting State programs.

If section 307(c)(1) is to be broadened by the adoption of the "significantly affecting" standard, Congress should relax, not tighten, the consistency requirement to ensure that vital federal interests will not be sacrificed to State and local concerns.

AGENCY COMMENTS

The following agencies have written either to the Senate Commerce Committee or the House of Representatives Committee on Merchant Marine and Fisheries on the pending CZMA consistency legislation: Department of Justice, Department of the Navy, Department of Transportation, and Department of the Interior.

TED STEVENS.
RUSSELL LONG.
BARRY GOLDWATER.

Attachments.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 3, 1984.

Hon. NORMAN D. SHUMWAY,
House of Representatives,
Washington, DC.

DEAR CONGRESSMAN SHUMWAY: This is in response to your request for our views concerning the potential impact of H.R. 4589 on national policy issues. You wished us to discuss three topics: (1) whether the proposed amendments to Section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. 1456(c)(1), will affect every federal agency and all federal activities; (2) whether the amendments would have the effect of elevating state coastal concerns over national policy and (3) whether they would provide coastal states with an unrestrained veto over oil and gas lease sales conducted pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 et seq. As we more fully discuss below, we share your concerns about the widespread impact of the proposed CZMA amendments. In order to fully understand the potential effect of the Amendments, however, an understanding of the existing statutory and regulatory regime is necessary.

Section 307(c)(1) of the CZMA as enacted in 1972 provides: "Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. 1456(c)(1). As can readily be seen, this is a statutory provision imposing a substantive limit on the content of federal activities. Section 307(c)(1) does not prescribe procedures, consultation, or documentation; it requires that the result of consistency be obtained. In this regard, it resembles the original Section 7 of the Endangered Species Act, 16 U.S.C. 1536, which was considered by the Supreme Court in *TVA* v. *Hill,* 437 U.S. 153 (1978) (the Snail Darter case). In imposing this limitation on the content of federal activities in 1972, Congress thought that the national interest would be protected because federal agencies would have an opportunity to comment on state CZMA programs before they were approved by the Secretary of Commerce. See Sections 307(a) and 307(b), 16 U.S.C. 1456 (a) and (b). Through this process, Congress thought state and federal conflicts would be resolved in advance of approval. H.R. Rep. No. 92-1049, 94th Cong., 2d Sess. 19 (1972). As of this writing, approximately 28 states and territories have coastal zone management programs that have been approved by the Secretary of Commerce.

While Section 307(c)(1) does not mandate any procedures, the National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce has promulgated extensive interpretive and procedural regulations. 15 C.F.R. Part 930. For example, a federal

activity within the meaning of Section 307(c)(1) is defined as "any function performed by or on behalf of a federal agency" except those permitting or assistance functions covered by Section 307(c)(3) and 307(d) of the Act. 15 C.F.R. 930.31. If such an activity "directly affects" the coastal zone, the federal agency must prepare a document called a "consistency determination" and submit it to the state coastal agency "at least 90 days before final approval of the Federal activity." 15 C.F.R. 930.34. This consistency determination must include an analysis of the state's coastal zone management program, a detailed description of the activity and its coastal zone effects and "comprehensive data and information sufficient to support the Federal agency's consistency statement." 15 C.F.R. 930.39(a). Federal agencies "must ensure that their activities are consistent to the maximum extent practicable with the enforceable, mandatory policies of the management program." 15 C.F.R. 930.39(c). Once this consistency determination is delivered to the state agency, the state is free to disagree within 60 days (45 days plus an automatic 15-day extension). If the state does disagree, it may go to court to seek to enjoin the federal activity. 15 C.F.R. 930.116.

Based upon this Department's experience in litigating coastal zone cases the outcome of a court case involving the consistency requirements of the CZMA is very problematic. The "enforceable and mandatory policies" of a state's coastal zone management program are often general statements of policy rather than specific limitations. These general statements must be interpreted or applied to the facts of each individual case.[1] When the state and federal agencies disagree in interpretation and application, the states often argue in court that their interpretation should prevail because it's their management program. The states claim this is appropriate "deference" but, if adopted by the courts uncritically, this deference amounts to an unrestrained veto power.

With this as background, it is now possible to turn to a discussion of the potential impacts of the proposed amendments. Let us take the definitions of the proposed bill and apply them to the present regime under the existing regulations. One obtains the following result: "Any function performed by or on behalf of a federal agency which initiates a chain of events likely to result in identifiable social or economic consequences in the coastal zone shall be conducted in a manner that is, to the maximum extent practicable, consistent with approved state coastal zone management programs."

As can be readily seen, the proposed amendments would apply to any function of the federal government, with few exceptions. Although it is possible that some federal action somewhere or sometime may be found not to result in an identifiable effect in the coastal zone through a "chain of events," one certainly cannot exclude, a fortiori, any class or category of federal actions, other than

[1] This process of interpretation and application of general policy statements can render the pre-approval commenting process of Section 307(a) and (b) virtually meaningless. Federal agencies often have no advance warning of how the state coastal authorities will interpret their programs and apply them to individual federal actions. For example, the California Coastal Zone Management Plan does not specifically list OCS leasing as a federal activity subject to consistency.

those excepted in the regulations, from coverage under the proposed amendments. As a result, the very least that can be expected from the proposed bill, would be an obligation on federal agencies to prepare a "consistency determination" on virtually every action they take an wait 90 days before taking that action. 15 C.F.R. 930.34. If the amendments were followed literally by federal agencies, the resulting paper blizzard would overburden both federal authorities and state coastal management authorities.

Once the obligation is created to prepare a consistency determination, the agency must ensure that its actions are, to the maximum extent practicable, consistent with the enforceable and mandatory policies of the state program. As stated above, the policies are often vague, general statements which are subject to administration, application and interpretation on a case-by-case basis. For example, a state program may well have a policy which encourages the food fishing industry. Potentially, any federal action which would affect the consumption of fish in the nation or abroad (i.e., food stamps, inspection requirements or export rules) or affect the costs of the fishing industry (interest rates, safety rules for workers) could be deemed inconsistent with that policy as interpreted or applied by the state coastal authorities. If the coastal authorities of different states came to different conclusions concerning the consistency of a nationwide federal action, it is unclear how the conflict would be resolved. Would different states have their own rules, or would the least restrictive, or most restrictive, state policy prevail nationwide?

Most of these problems with the proposed amendments result from the addition of the terms "economic and social" into the definition of "direct effects." Nevertheless, even if those terms were to be eliminated, the proposed amendments still could create considerable trouble. This is because the amendments would require consistency for actions that "initiate a chain of events likely to result" in identifiable effects in the coastal zone. The problem we have encountered in preparing consistency determinations under a similar standard, mandated by the Ninth Circuit, is that at early stages of a project or in planning, no specific result—identifiable in time, place, contour, intensity or so on—is likely. There are usually a range of possibilities—some may ultimately have an effect on the coastal zone, some may not; some impacts on the coastal zone may be minor while others may not, and so forth. For example, a coal lease sale in Wyoming may initiate a chain of events that leads to the construction of a coal slurry pipeline. That pipeline may go to the Mississippi River system or it may go to the Great Lakes. The slurry water may be recycled or it may be discharged into receiving waters. At the time of the coal lease sale, before the pipeline is planned in detail, how can it possibly be determined whether the effect on the coastal zone of Louisiana, Wisconsin, Illinois or Indiana is consistent with any or all of their management programs?

When this uncertainty about the actual end product of the "chain of events" is coupled with the vague and general nature of the enforceable and mandatory policies of state coastal zone management programs, the stage is set for federal-state conflict with no clear rules for their resolution. At one extreme, if the federal government is limited to taking only those actions about which it can

guarantee to 28 states and territories that no objectionable physical or biological impact will ever flow to their coastal zones, there will be very little the government will be free to do. At the other extreme, if the government is required to ensure consistency only for impacts reasonably certain to occur, there is no reason to employ the "chain of events" language in the statute. At the early stages of a project, no specific impact is reasonably certain to occur.

The objectives of the drafters of these CZMA amendments is presumably to supercede the Supreme Court's decision in *Secretary* v. *California,* Nos. 82–1326; 1327; 1511 (January 11, 1984). That decision ruled that OCS leases sales were not "activities" "directly affecting" the coastal zone within the meaning of Section 307(c)(1) of the CZMA. The amendments as drafted fail of their purpose because they do not render OCS leases sales federal activities within the meaning of Section 307(c)(1). The Court ruled that the sales fell within Section 307(c)(3), and under the regulations, 15 C.F.R. 930.31, that ruling excludes them from 307(c)(1). Aside from this technical difficulty, the proposed amendments really do not describe the OCS oil and gas lease process accurately. The "chain of events" language in the amendments is designed to reach OCS sales because it is undisputed that the lease sales have no direct, immediate impact on the coastal zone. What has been stated above concerning the difficulties of identifying the potential effects of uncertain future activities applies forcefully to lease sales. For example, historically, only 41 percent of tracts offered for lease result in a lease. (Under the areawide offering concept that began in April, 1983, the percent is much smaller. In some cases, fewer than one percent of all tracts are leased.) If offering a tract for lease were deemed to initiate a chain of events of coastal zone consequence only if that consequence were likely (*i.e.,* more than 50 percent), no OCS lease sales would fall within that definition. Going further, a tract leased may not be explored; and, if it is, exploratory wells are successful in finding commercial quantities of hydrocarbons only at a rate under 10 percent. Thus, presuming that all leased tracts are explored, there is, on historical evidence, approximately a 4 percent chance of coastal zone impacts from offering a tract for lease. Thus, the language of the proposed amendments dictating consistency for actions initiating a chain of events likely to resut in impacts on the coastal zone does not, under the realities of the OCS oil and gas process, reach OCS lease sales. Only if the term "likely" is interpreted to mean "capable of" with some low probability would OCS sales be included within the definition.

Finally, if the amendments were deemed effective to bring OCS lease sales within the provisions of Section 307(c)(1), the probable result would be to extend de facto veto power to the coastal states. Because of the factors discussed above—generality of the plans, uncertainty about future impacts, and the deference argument—the ability of the federal government to prevail in a court case is problematic. These factors are exacerbated in OCS lease sale litigation because the critical issues are usually fought out in preliminary injunction motions typically filed, briefed and argued in a three-week period before a lease sale is scheduled to be held. In order to truly "prevail" in an OCS lease sale case, it is not enough to ultimately win in the district or appellate courts several years later. Because

OCS lease sales, by congressional mandate, 43 U.S.C. 1344, are scheduled on a Five-Year Program, a lengthy litigation delay in a sale is often the equivalent of a cancellation of the sale. Congress has previously expressed its dismay at the delays caused by lease sale litigation, H.R. Rep. No. 95–1835, 95th Cong., 2d Sess. 20 (1979) and, in fact, designed the 1978 Amendments to the OCSLA for the purpose of avoiding such litigation. H.R. Rep. No. 95–950, 95th Cong., 1st Sess. 164 (1977).

Finally, we believe the states have adequate opportunity to protect their interests as the law now stands and that it is not in the national interest to afford to them an unrestrained veto power over OCS oil and gas leasing. Section 19 of the OCSLA, 43 U.S.C. 1345, grants to coastal states all the power they claim to seek under the CZMA short of an unrestrained veto. Section 19 requires the Secretary of the Interior to ask the states for their recommendations concerning the "size, timing or location" of a proposed lease sale. When the states' recommendations are made, the Secretary must afford an opportunity for consultation. Finally, the Secretary must accepts the state governor's recommendations unless he determines that those recommendations do not provide for a reasonable balance between the national interest and the wellbeing of the citizens of the state. As the implementation of the provisions of Section 19 has developed over the years, the states usually voice their coastal zone concerns in these recommendations. Consultation under Section 19 has resulted in agreement between the state governors and the Secretary concerning individual lease sales. And, even absent agreement, tracts originally proposed for leasing have been eliminated in virtually every sale at the request of the state governors. In short, the Section 19 process provides the states with opportunities for consultation, mandates consideration of their concerns, and requires the secretary to have national interest reasons for declining to follow the states' recommendations. Thus, Section 19 offers the states every right they claim to seek in Section 307(c)(1) consistency except one—an unrestrained veto power. We believe passage of these proposed amendments could have that result.

The Officer of Management and Budget has advised that there is not objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General.

DEPARTMENT OF THE NAVY,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 1, 1984.

Hon. WALTER B. JONES,
Chairman, Committee on Merchant Marine and Fisheries, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Department of the Navy, on behalf of the Department of the Defense, opposes H.R. 4589, 98th Congress, a bill "To amend the Coastal Zone Management Act of 1972 regard-

ing Federal activities that are subject to the Federal consistency provisions of the Act, and for other purposes," and S. 2324, 98th Congress, a bill "To amend the Coastal Zone Management Act of 1972 regarding activities directly affecting the coastal zone," as presently drafted. Both bills attempt to overcome recent Supreme Court pronouncements concerning the limits of state authority under the Coastal Zone Management Act (CZMA) of 1972 to influence the Department of Interior's oil and gas lease sales on the outer continental shelf.

As a major user and principal resident of this nation's coastal region, the United States Navy cooperates conscientiously with state and local officials and other federal agencies to protect and enhance the resources of the coastal zone. In the vast majority of instances the Navy has found that acceptable agreements can be reached which recognize the importance of the Navy mission and the significance of a state's coastal zone. These agreements are based on a recognition by all parties that under the existing statute and regulations, the Navy has the responsibility to make the initial threshold determination as to what activities "directly affect" the coastal zone. In addition, the CZMA, 16 U.S.C. § 1415 et seq., specifically excludes federal lands from the impact of the Act's structure.

The Navy's experience to date with the existing statute and regulations has been generally positive. Most states have recognized the Navy's need to operate in the coastal zone, while the Navy has worked to assure compliance with state coastal management plans to the fullest extent practicable. H.R. 4589 and S. 2324 would destroy this inter-governmental cooperation by undermining the delicate, but fair and effective, balance of state and federal interests found in Section 307(c)(1) of the CZMA for managing federal activities directly affecting state coastal zones.

H.R. 4589 and S. 2324 are worded and structured differently, but both undermine the balanced approach found in the CZMA. That approach requires federally supported activity directly affecting the coastal zone be conducted consistently, to the maximum extent practicable, with state plans for managing the coastal zone. H.R. 4589 and S. 2324 replace the consistency "to the maximum extent practicable" approach with a requirement that federal activities, with certain exceptions, must be fully consistent with state management plans.

This proposed standard of full consistency fully subordinates federal interests to state interests. The complete subordination of federal interests fundamentally restructures the ordering of state and federal interests under the CZMA to the extent that the proposed legislation is inconsistent with the Congressional finding that the key to coastal zone management is the full use of state authority in cooperation with federal and other interests (Section 302(i) of the CZMA). Further, without directly repealing the existing provision of law, the proposed amendments would render meaningless the Act's present exclusion of federal lands.

Under H.R. 4589 such elemental Navy activities as port visits, training in operation areas, amphibious landings on federal reserves, and weapons testing could be subject to the control of state authorities if these officials determined the activities produced

identifiable physical, biological, social or economic consequences in the coastal zone or initiated a chain of events likely to result in such consequences. S. 2324 would require these activities be consistent only to the maximum extent practicable if necessary for national security, but even that formulation raises the real possibility that Navy activities would be suspended while litigating whether the activity was one that was "necessary for reasons of national security." Clearly, the enactment of H.R. 4589 or S. 2324 would have an unacceptable impact on Navy operations.

The Navy has reviewed the recent Supreme Court decision in *Secretary of the Interior* v. *California,* and has concluded that the opinion does not significantly modify the existing relationship between states and the Navy. On the contrary, it appears that the decision adds clarification to existing regulations which have, to date, not been fully understood by states and federal agencies, such as, the right of federal agencies to establish the threshold of a significant direct affect on the coastal zone. The Supreme Court decision may indeed substantially modify oil gas leasing requirements under the Coastal Zone Management Act; however, if Congress intends to correct a perceived error on the part of the Court, regarding OCS oil and gas leasing, it is Navy's position that H.R. 4589 goes far beyond accomplishing this intended purpose. In fact, rather than support H.R. 4589, which Navy believes to be premature and far reaching in scope, we would recommend that any changes in the CZMA consistency provisions await an analysis based on experience with the existing statute and the NOAA regulations, which may be amended in light of the Supreme Court decision. This could be accomplished with a view toward CZMA re-authorization in 1985.

Not only do current regulations provide adequate safeguards to states in the area of oil and gas leases, such as Section 307(c)(3)(b), relating to the need for a consistency determination for exploration, development and production of OCS areas subsequent to lease sales, but the Navy believes that Congress has passed numerous other pieces of legislation which also provides states protection against uncontrolled federal development. The Federal Water Pollution Control Act, Federal Air Pollution Control Act, Resource Conservation and Recovery Act all have waivers of sovereign immunity requiring the federal agency to comply with state and local laws relating to those particular areas of concern. The Federal Endangered Species Act and National Environmental Policy Act are further examples of federal statutes that provide a viable handle to states that believe a federal agency is proposing an action which will significantly impact a valuable state resource, regardless of its location.

Another problem arises with the expansion of the term coastal zone to include activities "whether within, or landward or seaward of, the coastal zone." This expansion of the area which potentially is directly affected by an activity of a federal agency is simply too broad. It would allow states to become planning partners with the Navy for proposals inland and seaward of the coastal zone without any limit on distance. This becomes even more possible if we consider the bills' proposed definition of directly affects: "produces identifiable physical, biological, social, or economic consequences in

the coastal zone." Almost any activity that any federal agency undertakes will produce a social or economic consequence in a states coastal zone, especially when the coastal zone is expanded to include areas landward and seaward of the coastal zone for an undefined range.

It is virtually impossible to predict the increased cost of operations in the event that either of these proposed amendments become law, though it can be anticipated to be great in terms of administrative effort, manpower, time, and dollars. Most importantly, the proposed amendments' broad scope would provide a fertile breeding ground for endless and costly litigation over virtually every detail of Navy operations in coastal areas.

The Department of the Army has requested that this legislative report present a paragraph reflecting the specific views of the Army concerning H.R. 4589 and S. 2324, with respect to the Army's military activities nationwide. The potential impact of these bills on the Department of the Army's civil works responsibilities will be addressed in separate Army legislative reports. The Department of the Army operates numerous military bases, reservations, and activities located in the coastal zone and elsewhere within states with approved CZMA plans. The Army believes that enactment of either of the subject bills could prove extremely disruptive to those facilities and to important Army missions, could be extremely expensive, and would constitute an unacceptable administrative burden. The Department of the Army agrees with the criticisms of the subject bills presented in the Navy's report, and joins the Navy in opposing enactment of each bill.

For the Secretary of the Navy.

Sincerely,

R. C. HOWARD,
Captain, JAGC, U.S. Navy,
Director, Legislation.

U.S. DEPARTMENT OF TRANSPORTATION,
Washington, DC, April 30, 1984.

Hon. WALTER B. JONES,
Chairman, Committee on Merchant Marine and Fisheries, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Transportation on H.R. 4589, a bill "To amend the Coastal Zone Management Act of 1972 regarding Federal activities that are subject to the Federal consistency provisions of the Act, and for other purposes."

H.R. 4589 would expand the definition of an activity affecting the coastal zone by including activities landward and seaward as well as those within it. The bill also adds definitions of the phrase "that directly affects the coastal zone" and the phrase "maximum extent practicable."

We object to the bill's broad definition of an activity "that directly affects the coastal zone." A number of programs administered by the Department of Transportation would be impacted by this broad definition, including the provision of air or ocean navigational aids

by the Federal Aviation Administration or the Coast Guard. The bill defines "directly affecting" in such broad terms that almost any action taken by the Coast Guard and a number of actions administered by the Federal Aviation Administration and the Federal Highway Administration could be considered to "directly affect" a coastal zone and require a consistency determination.

In addition, the definition of "consistent to the maximum extent practicable" is internally inconsistent. The bill would define to the "maximum extent practicable" to mean fully consistent with State programs. Full consistency is a 100% or ideal standard, while the "to the maximum extent practicable" standard allows flexibility for Federal agencies which are unable to conduct their operations in full compliance for justifiable reasons.

The language providing exceptions, however, is narrow and there are no provisions for excluding most Coast Guard or Federal Aviation Administration mandated activities.

On other elements of the bill, we defer to the views of the Departments of Commerce and the Interior.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this report for the consideration of the Congress.

Sincerely,

JIM J. MARQUEZ,
General Counsel.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., April 11, 1984.

Hon. ROBERT PACKWOOD;
U.S. Senate
Washington, D.C.

DEAR SENATOR PACKWOOD: As stated in recent press accounts, in an April 2, 1984, speech before the National Ocean Industries Association (NOIA), I made some remarks concerning the Coastal Zone Management (CZM) bills currently before Congress. I stated then that I would recommend a veto should S. 2324 be presented to the President in its present form. Although you will shortly be receiving a detailed report of my reasons for our opposing S. 2324, I want to state the rationale for my opposition.

Shortly after becoming Secretary, I sought to redetermine policies affecting Outer Continental Shelf (OCS) leasing, including CZM issues. On January 12, 1984, I outlined new procedures, particularly our new consultative process in an address delivered to the OCS Advisory Board. I enclose a copy of the text of that address.

Further, our Director of the Minerals Management Service, William D. Bettenberg, testified before your committee on March 28, 1984, and presented our new procedures. Mr. Bettenberg outlined new initiatives and plans to work with States and other interested parties in an open, cooperative spirit. We have been operating ac-

cordingly in what I assure you is a spirit of good faith toward all parties concerned.

An example of how we hope to resolve the concerns of coastal States, at a point early in the OCS leasing process, is the recently delayed OCS lease sale of tracts in the Gorda Ridge which have a high potential for polymetallic sulfides. Originally, that sale was scheduled for September of this year. However, after listening to the concerns of the State of Oregon about the upcoming sale, I formed a joint Federal-State working group to consider the economic, engineering, and environmental aspects of possible ocean mining in that area and to share in the scoping and preparation of an environmental impact statement to assess the development potential of polymetallic sulfides in the area. Any possible sale has now been placed on indefinite hold to provide sufficient time for the working group to carry out these responsibilities.

I believe the existing statutory provisions, including the Outer Continental Shelf Lands Act (OCSLA) and the Coastal Zone Management Act (CZMA), are fully appropriate and adequate to resolve coastal conflicts.

This Nation's offshore leasing program is guided by a clear congressional mandate expressed in the (OCSLA. The first stated purpose of that Act is to:

"Establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve National economic and energy policy goals, assure National security, reduce dependence on foreign sources, and maintain a favorable balance of payments in the world trade."

The Department of the Interior's policies have alway been, and must remain, consistent with the congressional intent as stated in 1978. We are committed to expeditiously exploring the OCS and encouraging production while protecting our vital marine and coastal environments.

Any detailed consideration of changing programs which govern our Nation's offshore energy supply and affect our coastal zone must take into account that a phased and detailed process has already been established under the framework of the OCSLA and the CZMA.

Under this process, coastal States are given various opportunities to influence decisionmaking. In developing the five year leasing program, section 18 of the OCSLA requires the Secretary to consult with the coastal States. Once the program is developed, it is then sent to the States and the Congress for further comment prior to its approval. Under section 19 of the OCSLA, the Secretary is mandated to consider the comments of affected coastal States regarding the size, timing, and location of individual lease sales as part of the balancing process. State coastal zone management agencies will also be asked to submit their comments at this time as well.

Prior to any drilling taking place on a lease, both the OCSLA and the CZMA contain safeguards to ensure that those activities will be carried out in a manner which will consider State concerns. Section 11 of the UCSLA gives affected coastal States the opportunity to review and comment upon exploration plans submitted by

lessees. Section 307(c)(3)(B) of the CZMA provides these same coastal States with the opportunity to require the exploration plans to be consistent with their approved State CZM programs. Finally, the OCSLA and the CZMA again work in tandem at the development plan stage. Section 25 of the OCSLA provides for State review and comment while section 307(c)(3)(B) of the CZMA provides coastal States with a further opportunity to certify the consistency of development plans with their approved CZMA programs. The Secretary of Interior cannot issue any permits in conjunction with either OCS exploration or development activities until State concurrence has been given.

The pending legislation will destroy the delicate and detailed balancing process required in the existing statutes. The bill is unnecessary and, because it represents a piecemeal approach to a complex issue, is ill-advised. The legislation would:

(1) set coastal State interest above national interests;

(2) create conflicts rather than resolve them; and

(3) impose undue administrative and litigative burden and undermine the purposes of the CZMA.

Not only would the legislation severely restrict our OCS program, but it would also have detrimental impacts on other Departmental programs. In the past few weeks, professionals from the Bureau of Land Management, the National Park Service (NPS), the U.S. Fish and Wildlife Service (FWS), and the Bureau of Reclamation have expressed concerns which we will detail in our upcoming report. With respect to the NPS and the FWS, there are fears that State veto power over Federal programs would compromise environmental standards being developed to carry out conservation management duties.

I, therefore, have come to conclude that I would recommend a veto of this bill should it reach the President's desk in the current form. I would ask that the Congress review the initiatives of our Department and the Department of Commerce as a preferred alternative to S. 2324 for resolving the outstanding issues surrounding coastal zone management. We would be pleased to discuss this with you further.

Sincerely,

WILLIAM CLARK.

THE SECRETARY OF THE INTERIOR,
Washington, April 27, 1984.

Hon. ROBERT PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This responds to your request for our views on S. 2324, a bill "To amend the Coastal Zone Management Act of 1972 regarding activities directly affecting the coastal zone."

We oppose the enactment of this legislation and if it is enrolled, we will recommend to the President that he disapprove the bill.

We recognize and share the concerns of the Congress and of the States for proper balancing of the development on the Outer Continental Shelf (OCS) and the protection of coastal resources. There is

no question that postlease activites affecting the coast must be consistent with State management programs. We are committed to identifying and attempting to resolve potential postlease consistency problems in the preleasing process, and to maintaining communication to ensure that major issues of concern to the States are appropriately considered throughout the process. We have recently completed a review of the requirements of sections 18 and 19 of the OCS Lands Act Amendments of 1978, section 307(c)(3) of the Coastal Zone Management Act (CZMA), and the Department's procedures for ensuring consistency. We believe that these provisions, in combination with recent initiatives of the Departments of the Interior and Commerce, fully ensure that balance will be achieved and that coastal conflicts will be adequately resolved.

Thus, we strongly believe that enactment of S. 2324 is unnecessary. Furthermore, enactment of this legislation would create a number of serious problems discussed below.

S. 2324 would amend section 307(c)(1) of the CZMA to require each Federal agency conducting or supporting an activity (whether within, or landward or seaward of, the coastal zone) that directly affects the coastal zone to conduct or support that activity in a manner which is fully consistent with State management programs approved by the Secretary of Commerce pursuant to the CZMA unless the Federal activity is undertaken to counter the effects of a declared national emergency; necessary for reasons of national security; or required by any provision of a Federal law which prevents consistency with any provision of an approved State management program. Any Federal activity which is subject to one of these three exceptions must be consistent, to the maximum extent possible, with approved State management programs.

The bill further states that an activity shall be treated as one "that directly affects the coastal zone" if the conduct or support of the activity produces identifiable physical, biological, social, or economic consequences in the coastal zone or initiates a "chain of events" likely to result in any of such consequences.

Section 307(c)(1) now requires each Federal agency conducting or supporting activities directly affecting the coastal zone to conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved State management programs. Recently, the Supreme Court in *Secretary of the Interior* v. *California* held that the Congress did not intend this language to cover oil and gas leasing on the Outer Continental Shelf and that an oil and gas lease sale does not "directly affect" the coastal zone for purposes of section 307(c)(1). Enactment of S. 2324 apparently is intended to override this decision through the bill's specific definition of which activities "directly affect" the coastal zone.

PROBLEMS WITH THE AMENDATORY LANGUAGE OF S. 2324

The effect of the enactment of S. 2324 would be to expand greatly the number of Federal activities that would be required to be conducted or supported in a manner that is fully consistent with approved State management programs. This expansion is accomplished by amending the current section 307(c)(1) in three ways.

First, S. 2324 would expand the area in which Federal activities are subject to the consistency requirements of CZMA. Under the proposed new section 307(c)(1)(A), activities conducted within, or landward of or seaward of, the coastal zone that directly affect the coastal zone are covered by the requirements of the section. This amendment, coupled with the other proposed new language discussed below, could be construed as giving the coastal States a veto power over virtually any Federal activity that meets the proposed new broad "directly affects" test.

Second, the proposed new section 307(c)(1)(B) would define activities as ones that directly affect the coastal zone if (1) the conduct or support of those activities produces physical, biological, social, or economic consequences in the coastal zone; or (2) the conduct or support of those activities initiates a chain of events likely to result in any such consequences. The first is troublesome for a number of reasons. There are many instances where a Federal agency's mandate requires it to weigh unevenly the consequences of its actions. For example, it is in the best interest of the public that the Environmental Protection Agency (EPA) ban the use of certain pesticides that have been found to be potentially dangerous for human consumption. In these cases, we expect the EPA to weigh more heavily the health considerations involved than the economic considerations involved. In a like manner, several Federal agencies, including the U.S. Fish and Wildlife Service and the National Park Service, have a mandate to protect and manage natural resources and thus, do not, and should not, base their resource management decisions primarily on economic and social considerations. In particular, the U.S. Fish and Wildlife Service, in carrying out its mandated responsibilities under the Refuge Administration Act to manage refuges for the purposes for which they were established, undertakes essential habitat and resource management activities that could be seriously affected if driven by social and economic consequences.

In addition, this test could blur the distinction between direct and indirect effects. There will be instances, particularly in remote areas of the country near the coastal zone, such as areas of Alaska, where the conduct of any Federal activity may have a spillover economic and social effect on the coastal zone. We do not believe that it is appropriate for the coastal zone States to be put in the position of deciding for the Federal Government how such activities must be conducted.

The second test involved in the new "directly affects" definition is the "chain of events" test. The "chain of events" test is intended to codify a formulation of "directly affecting" espoused by the plaintiffs, adopted by the Ninth Circuit, and rejected by the Supreme Court in *Secretary of the Interior* v. *California*. The problem with this test is that it would require Federal consistency determinations to be made prematurely, before it can be said with certainty that a proposed action requiring the favorable resolution of each of a number of preliminary steps will, in fact, be undertaken. The consequences of this prematurity would be (1) the unnecessary and wasteful burden of having to prepare a consistency determination for the initial step of a proposal that never comes to fruition, (2) the impossible task of having to prepare a consistency determina-

tion at a stage when the direct environmental effects of a proposed action are yet unknown because the details of the proposal are not established, and (3) a product that, because of the hypothetical generalities in which it would necessarily have to be written, is likely to be inaccurate and meaningless.

This Department undertakes many activities that, although they may have important legal consequences, do not themselves have on-the-ground effects because they require completion of subsequent events in order to accomplish their purposes. Two examples are the promulgation of regulations governing oil and gas exploration for the Arctic National Wildlife Refuge's coastal plain and the execution of an agreement to exchange lands.

Promulgation of the regulations was only a preliminary step of the exploration program. In this instance, it was not even the first step, as it was preceded by the initiation of a baseline resource study as part of the preparation of an environmental impact statement. Before impacts could occur, exploration plans would have to be submitted, received, and approved and permits would have to be issued.

Similarly, the transfer of title in the land exchange situation did not itself authorize the acquiring private party to engage in any activities on the lands it acquired. Rather, the exchange gave the acquiring party the opportunity to seek the appropriate Federal, State, and local permits to use the property in the manner contemplated by it. Yet, in both cases, given the Ninth Circuit's view of "directly affecting" in *Secretary of the Interior* v. *California* and the Department's desire to minimize the risk of litigation, the Department prepared consistency determinations and submitted them for State review as a matter of comity. The ability to make consistency determinations in these instances depended largely on stating that the current action would not impair the integrity of subsequent Federal, State, and local permitting processes. Preparation of a consistency determination early in an agency's planning efforts, as the proposed legislation would require, only to reach this conclusion, or other similarly general and hypothetical conclusions, is an inefficient use of agency time and resources.

Further examples of our problems with the "chain of events" test will be set forth below in our discussion of the legislation's impact on the programs of the National Park Service and the U.S. Fish and Wildlife Service.

Our discomfort with making consistency determinations prematurely, particularly where the ultimate activities are going to be carried out by private parties, is doubled by the coupling of the "chain of events" test with the full consistency standard discussed below. This means that in the formative stages of Federal planning a Federal Agency must assure that subsequent activities, even if actually carried out by third parties, will be fully consitent with State policies. Again, this puts an unrealistic and heavy burden on Federal managers.

The proposed new section 307(c)(1)(A) would require that Federal activities be fully consistent with approved State management programs unless the activity involved is undertaken to counter the immediate effects of a declared national emergency, is necessary for reasons of national security, or is required by any provision of law

which prevents full consistency. This proposed new section poses several serious problems.

If enacted into law, this provision would severely curtail the abilities of Federal agencies to fulfill their statutory responsibilities. Most State CZM programs are worded in very general terms in order to provide a large degree of discretion to the State agency charged with implementing the State program. As a result, Federal agencies will be forced to speculate as to the interpretation of a particular State program or policy, only to be told by the State that the Federal proposal may not proceed because it is not fully consistent. Because few Federal activities will fall under the three exceptions to full consistency, enactment of this legislation could be construed as giving coastal States broad veto authority over Federal activities.

This construction is bolstered by the fact that the legislation does not provide the Federal agency involved with the clear authority to make the final determination of whether a Federal activity is directly affecting the coastal zone or is being conducted in a manner that is fully consistent with the State's program.

EFFECTS OF ENACTMENT OF S. 2324 ON THE OCS LEASING PROGRAM

We foresee serious problems for the OCS leasing program if S. 2324 is enacted. The effect of the amendments described above would be to require the Secretary of the Interior to make consistency determinations for prelease activities, thus obliging him to determine whether a hypothetical scenario of oil and gas activities on the OCS, designed to comply with the National Environmental Policy Act, is consistent with an often vague and general State management program. One need only read the consistency determinations produced by this Department in an attempt to comply with the Ninth Circuit's ruling on OCS Sale 53 to see that determinations of this sort are an unproductive use of Federal agency and State CZM agency resources.

Such a determination might also have to be made, if S. 2324 is enacted, when the Secretary develops his Congressionally mandated 5-year OCS oil and gas leasing program. This would put the coastal States in the position of upsetting the timing, size, and location of leasing regardless of how remote the tracts involved are from the coastal zone. Billions of dollars of OCS revenues could easily be lost over the next few years alone if coastal States were to use this huge grant of authority to halt the OCS leasing program off their respective coasts.

There is enclosed for your consideration a copy of this Department's testimony before your committee on this legislation in which we have set forth a number of actions that the Department has recently initiated to help resolve some of the coastal zone mamagement problems raised by the States concerning the OCS program. These initiatives have been designed to promote the kind of coordination and cooperation between the Federal Government and State governments that is supposedly the purpose of the Federal consistency requirements of section 307(c)(1) of the CZMA.

EFFECTS OF ENACTMENT OF S. 2324 ON THE PROGRAMS OF THE NATIONAL PARK SERVICE AND THE U.S. FISH AND WILDLIFE SERVICE

The National Park Service administers almost 800,000 acres of land in eleven national seashores an four national lakeshores. In addition, several national parks, such as Everglades in Florida, are adjacent to the coastal zone. Other historic sites and monuments also abut the coastal zone.

Management of these units of the National Park System is done in accordance with plans prepared to reflect statutory provisions in the authorizing legislation and Congressional intent. Rarely, however, is the authorizing legislation specific about the location, number, and extent of access roads or other developments, the kinds of activities to be permitted and encouraged, or the volume of public use within particular areas of the seashore or other unit. These determinations are based on the planning process, which reflects broad statutory policy. Thus, while we note that full consistency with State plans would not be required under S. 2324 were the Federal activity is required by Federal law, that provision would offer little relief in the case of the National Park Service's management concerns.

The National Park Service is particularly concerned by the fact that section 307(c)(1) does not contain clearly articulated legal authority for Federal agencies to follow standards that are environmentally more restrictive than standards or requirements contained in States' management programs. For example, the National Park Service may choose to provide a lesser level of access or development within a National Park System than may be advocated by a State management program for adjoining coastal zone areas under State management. The existing regulations already provide this authority to Federal agencies. See 15 CFR 930.39(d). In the absence of such authortity, the proposed full consistency language could result in permanent harm to the environmental fabric of coastal areas.

The U.S. Fish and Wildlife Service has more than 150 coastal refuges. These refuges provide essential habitat for migratory waterfowl that use the Atlantic and Pacific Coastal Flyways. The "fully consistent" provisions of S. 2324 could limit the ability of the Service to manage these refuges for the purposes for which they were established as required under the Refuge Administration Act. If certain Service activities such as prescribed burning for marsh habitat, impoundment development and management, or other intensive marsh or water management activities were not fully consistent with, or excepted from, a State's approved program, the Service's ability to conduct these essential management activities could be severely limited by the enactment of S. 2324.

The National Park Service and the U.S. Fish and Wildlife Service do not base their resource management decisions for the administration of parks and refuges primarily on economic and social considerations. When the legislation's definition of the term "directly affects" is coupled with the bill's full consistency requirement, it is quite possible that these agencies' strategies for dealing with resource management problems will become driven by the State's or the local coastal district's social and economic policies,

such as, a "pro-growth" policy for certain areas or municipalities or a "local hire" provision. Put simply, the broader the type of activities for which a consistency determination is required, the more difficulty and the less flexibility the Federal land manager could have in accomplishing his or her primary mission.

The "chain of events" provision of S. 2324, in particular, could severely interfere with the effective long-term management of refuges and parks. Both the U.S. Fish and Wildlife Service and the National park Service undertake many activities that may have important consequences for management of coastal refuges and park lands, but do not themselves have on-the-ground effects because subsequent events must be completed to accomplish their purposes. Major examples include promulgating regulations governing activities in coastal refuges and parks, developing refuge and park master plans and management plans, and executing land exchange agreements with private landowners in coastal areas. In the case of these and similar activities, as discussed previously, the "chain of events" provision would have the effect of forcing a premature determination of consistency on the Federal agency.

For example, in the specific instance of developing a general master plan for a park or refuge, the plan is only a preliminary step in a long-term resource management program. Before impacts could occur, detailed management plans based on the master plan would have to be developed, site plans would have to be formulated, and facilities would have to be designed.

Similarly, in the instance of promulgating regulations governing refuge or park activities, the rule-making itself constitutes only an initial step that has no on-the-ground impacts in and of itself. Under the "chain of event" provision, the requirement of a consistency determination is imposed on the U.S. Fish and Wildlife Service and the National Park Service at a stage when direct environmental effects of subsequent specific actions that might be proposed subject to the regulations are not known.

An additional major problem arises in the rule-making situation because many of the regulations promulgated by the U.S. Fish and Wildlife Service and the National Park Service govern activities throughout the National Wildlife Refuge or National Park System. By putting the coastal States in a position of having a veto power over Federal activities, the "directly affects" and "full consistency" provisions of S. 2324 could be construed to give a single State the authority to veto a regulation governing a national system.

EFFECTS OF ENACTMENT OF S. 2324 ON OTHER INTERIOR PROGRAMS

The Department of the Interior also administers several other programs that could be adversely affected by enactment of this legislation. Because the effect of this amendment is to require a much broader range of activities to be fully consistent with approved State management programs, we foresee serious problems with not only the administration of the programs of the National Park Service and the U.S. Fish and Wildlife Service, but also with those of the Bureau of Land Management and the Bureau of Reclamation. We are certain that a host of other activities conducted by a broad range of Federal agencies will also be adversely affected.

The Bureau of Land Management conducts a full range of land management activities that might be affected by this legislation. That agency can expect land management problems and conflicts with its mandate under the Federal Land Policy Management Act of 1976 and other Federal statutes similar to those discussed above of the National Park Service and the U.S. Fish and Wildlife Service.

The Bureau of Reclamation also has serious concerns with enactment of this legislation. The "chain of events" test would put that agency, as well, in the situation of expending unnecessary time and expense very early in a project proposal's planning stage. At such an early stage, a consistency determination is inappropriate because the project manager does not yet know enough about the effects of a project to render a determination. The project, for one reason or another, may be terminated later and, thus, the time involved in making the consistency determination is wasted.

Additionally, this legislation might require that projects already authorized by the Congress could be closely scrutinized by a coastal State and possibly stopped by that State. We object to the coastal States possibly having this kind of veto power over Congressionally authorized projects. Bureau projects are already subject to exacting environmental mitigation measures. Adding another level of regulation to them will prove to be costly and counter-productive.

SUMMARY OF THE ADMINISTRATION'S POSITION ON S. 2324

In short, the Administration is strongly opposed to the enactment of S. 2324. We foresee enactment of this legislation as having the potential for adversely affecting the activities conducted by virtually every agency of the Federal Government.

We believe that knowledge that section 307(c)(3) of the CZMA, as currently written, confers on a coastal State the power to stop the implementation by a third party of an activity requiring Federal authorization will be sufficient to cause a Federal administrator or land manager to be cognizant of the State's concerns in the early stages of formulating a Federal program. Moreover, the various established procedures for intergovernmental coordination, such as distributing environmental impact statements for comment and consultation, will continue to serve as vehicles for early communication of the State's views.

Accordingly, we consider the step at which the Federal permit or license is to be given or the step at which a Federal agency decides actually to undertake a physical activity as the most appropriate time for the State's formal CZMA consistency review. It is only at this stage that the proposed activity can be described with sufficient particularity to enable meaningful and accurate representations of consistency to be made.

We believe that the existing statute strikes an acceptable balance in accommodating Federal and State interests. This is because the consistency determination process leads to a reasoned analysis of the impacts of Federal activities and to consultation with, and deliberate consideration of the State's concerns in formulating and implementing the Federal activity which directly affects the coastal zone. At the same time, the statute preserves to the Federal land

manager the power to direct and control Federal activities on Federal lands. Enactment of S. 2324 would change this delicate balance of power between the Federal Government and State governments. In addition, it would make consistency determinations more burdensome by requiring an unrealistic and unreasonably high degree of predictability in assessing the outcome of Federal activities.

Finally, we are opposed to enactment of S. 2324 at this time because the National Oceanic and Atmospheric Administration is in the process of amending its regulations to reflect the Court's interpretation of section 307(c). The outcome of its efforts should be seen in order to assess more fairly the value of an amendment. Moreover, the CZMA comes up for reauthorization next year and that context should provide a better setting to judge the wisdom of changing the existing legislation.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Enclosure.

WILLIAM CLARK.

[Attachment 1]

STATE ACTIONS ON COASTAL ZONE MANAGEMENT ACT SECTION 307(c)(3) CONSISTENCY CERTIFICATIONS OF OCS OIL AND GAS EXPLORATION AND DEVELOPMENT AND PRODUCTION PLANS SINCE 1978

	Number approved w/o conditions [1]	Number of conditional or partial approvals	Numbers denied	Total certifications submitted
Atlantic	[2] 215	15	0	230
Gulf of Mexico	1,006	0	0	1,006
Pacific	59	[3] 18+	[4] 5	82+
Alaska	4	14	0	18
Total	1,284	47+	5	1.336+

[1] Pursuant to 15 CFR 930.79, a State must either concur or object to the consistency certification submitted with a plan.
[2] Approximately 20 percent of the plans are conclusively presumed by the Minerals Management Service to be consistent with State CZM programs because of lack of State response within the consistency timeframe mandated by the Coastal Zone Management Act.
[3] California has partially denied activities involving 18 exploration plans and in addition, State review of many other OCS plans have resulted in negotiation of plan changes between the applicant and the State, such as an additional 500 feet of oil spill containment boom, a right to request oil spill containment drill exercise, etc.
[4] OCS Plans Denied Federal Coastal Zone Management Act section 307(c)(3) Consistency Concurrence by the State:

State	Plan	Type	Under appeal to Commerce
California	Chevron P-0205	Exploration	No.
Do	Exxon Santa Ynez option A	Development	Yes.
Do	Union P-0203	Exploration	Yes.
Do	Sun P-0231	Exploration	No.
Do	Exxon P-0467	Exploration	Yes.

[Attachment 2]

Examples of the Difficulty of Making Meaningful Consistency Determinations at the Prelease Stage in the OCS Oil and Gas Development Process

SALE 82 (NORTH ATLANTIC)

The coastal zone off most of Massachusetts is included in State-designated ocean sanctuaries. The sanctuary regulations prohibit the building of any structure on the seabed or under the subsoil of the State's territorial waters within a designated sanctuary. The applicability of the Ocean Sanctuaries Act to pipelines is unclear as the act was originally passed to prohibit sewage outfalls. The hypothetical OCS oil and gas transportation scenario in the EIS on Sale 82, North Atlantic, included a pipeline with a landfall in Massachusetts. Massachusetts' comments on the draft EIS for Sale 82 indicated that it believes an OCS pipeline would fall under the Ocean Sanctuaries Act prohibition.

There is nothing in the sale itself that would require a pipeline to be built. Instead, a proposal for a pipeline would only be made if a quantity of hydrocarbons, sufficient to warrant building a pipeline, is discovered. However, that quantity may not be discovered in the North Atlantic OCS Planning Area. Further, should a pipeline actually be proposed, there is nothing in the sale proposal that would require it to come ashore through a Massachusetts ocean sanctuary. Finally, an application for a pipeline with a landfall in Massachusetts would have to comply with the Ocean Sanctuaries Act in order to obtain consistency concurrence under 307(c)(3) of the CZMA.

Without a specific proposal to consider, a ruling on the applicability of the Ocean Sanctuary Act to an OCS pipeline can not be made. Therefore, prior to an actual proposal for a pipeline in Massachusetts, consistency with this element of the CZM program cannot be conclusively demonstrated or disproven.

SALE 79 (EASTERN GULF OF MEXICO)

The Florida CZM program includes a statute providing for a review and permitting procedure for developments of regional impact, with special procedures for such developments in Areas of Critical State Concern. Charlotte Harbor is such an area. Under the State program, special regulations are to be formulated to permit developments of regional impact there. The EIS for Sale 79 hypothesized onshore support facilities at Charlotte Harbor for OCS activities. As with Sale 82, there is nothing in Sale 79 that would require Charlotte Harbor to be used for onshore support. Further, the special regulations required by the State plan, which had not yet been developed at the time the Sale 79 EIS was written, will apply to any development in Charlotte Harbor, regardless of whether it is related to OCS activities.

In the absence of specific regulations and of a specific proposal for use of Charlotte Harbor for OCS-related activities, there was no basis at the prelease stage for concluding that there might be future conflicts between this State CZM policy and future OCS activities. Florida, however, stated that the consistency analysis did not provide adequate assurance that State resources in Charlotte Harbor would be protected. In fact, Florida extended the argument about consistency with this statute to the Florida Keys, another Area of Critical State Concern, where no onshore facilities were hypothesized in the EIS. This State argument ignores both the lack of

information at the prelease stage and the amount of control available to the State for onshore development.

SALE 73 (CENTRAL CALIFORNIA)

The broad resource and use policies of the California Coastal Act were combined to support a California Coastal Commission position that a commitment to transportation of crude oil by pipeline rather than tankers was required to ensure consistency for Sale 73, offshore Central California. Evidence that the Commission recognizes the need to remain flexible on the question of transportation modes, however, is found in the recent apprcval of a plan of development and production in the promising Point Arguello field where tanker transport has been approved while the pipeline question continues to be studied.

Thus, the Department is faced with apparently contradictory statements of policy by the State. With such contradictions, it is most difficult, if not impossible, to address State CZM policies in a conclusive manner.

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